TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1903.~~ ~~1905~~ 1906.

No. ~~306.~~ ~~2~~ 2.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

FILED JUNE 28, 1904.

(19,406.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 306.

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a GULF, COLORADO & SANTA FE RAILWAY COMPANY, Plaintiff in Error, *versus* THE STATE OF TEXAS, Defendant in Error. } No. 1236.

Transcript from the Supreme Court of the State of Texas, at Austin.

1 Caption.

THE STATE OF TEXAS, County of Tarrant.

At a term of the district court (48th judicial district) begun and holden in and for the county of Tarrant at Fort Worth, Texas, on 12th day of May A. D. 1902, and which adjourned on the 28th day of July, A. D. 1902, before the Honorable Irby Dunklin, judge thereof, the following cause came on for trial, towit:

THE STATE OF TEXAS *vs.* THE GULF, COLORADO & SANTA FE RY. CO. } No. 21600.

2 Plaintiff's Original Petition.

Filed March 8, 1902.

In the District Court of Tarrant County, Texas, Judicial District.

THE STATE OF TEXAS, County of Tarrant.

To the honorable judge of said court:

The State of Texas, appearing herein by her attorney general, complaining of the Gulf Colorado & Santa Fe Railway Company, respectfully represents:—

That the defendant is a corporation duly organized, chartered and existing under and by virtue of the laws of the State of Texas, of which corporation —— —— who resides in the county of Tarrant, State of Texas, is the local agent representing said corporation.

That heretofore, to-wit, on the 1st day of January, 1902, and long prior to such date the defendant owned and operated a line or railroad extending from the city of Fort Worth in Tarrant county to the town of Goldthwaite, in Mills county, Texas; and that the Texas & Pacific Railway Company owned and operated a line of railway extending from the city of Texarkana, in Bowie county, to the city of Fort Worth, in Tarrant county, where it connected with the line of railroad of the defendant corporation. That each of said roads

were, at the time mentioned and have ever since been engaged in the business of transporting freight as a common carrier for hire between the points named.

That the railroad commission of the State of Texas, being thereunto fully organized and empowered, after due and proper notice given to the defendant company and to the Texas & Pacific Railway Company *at* the time and place when and where the rates would be fixed by it, and after due hearing had been accorded to the said railway companies, fixed and established 12½c. per one hundred pounds as the rate which might be charged by either of said roads, or by them jointly, for the transportation of corn in car load lots, for a distance of over 165 miles, which rates became effective on March 10th 1899 and remains effective to the present time.

3 That the said commission, more than twenty days prior to the 10th day of March, 1899, furnished the Texas & Pacific Railway Company and the defendant a printed schedule showing the said rates fixed by said commission to be charged by said roads for the transportation of corn in car load lots, and caused a certified copy of such schedule of rates to be delivered to each of said railroads at its principal office in the State of Texas.

That the distance from Texarkana to Goldthwaite, Texas over the Texas & Pacific Railway Company's road to Fort Worth and from Forth Worth over the defendant's road to Goldthwaite was more than 165 miles.

That heretofore, to-wit, on the 13th day of January, 1902 Samuel Hardin Grain Company, a co-partnership composed of Samuel Hardin and R. H. Hall, shipped from Texarkana, Texas, to themselves at Goldthwaite, Texas, by the Texas & Pacific Railway Company and the defendant company, a car load of sacked corn containing 66,000 pounds; that the said Texas & Pacific Railroad Company executed a bill of lading for said car load by the terms of which it agreed to transport the same from Texarkana to Goldthwaite, Texas, and there deliver the same to the order of Samuel Hardin Grain Company.

That it was well known both to the Texas & Pacific Railway Company and the Samuel Hardin Grain Company that the Texas & Pacific Railway Company's road did not extend to the town of Goldthwaite and that it was expressly understood and agreed between the said railway company and the Samuel Hardin Grain Company that the Texas & Pacific Railway Company would transport said car load of grain to the city of Fort Worth where it would deliver the same to defendant to be by it transported to Goldthwaite.

That in receiving and contracting to deliver the said corn at Goldthwaite, the Texas & Pacific Company was the agent of the defendant and was authorized to contract for and in behalf of the defendant for the delivering of said corn by the defendant at Goldthwaite.

That the said Texas & Pacific Railway Company transported said car-load of corn to the city of Fort Worth, where it delivered the

same to the defendant from whence the defendant transported
4 the same to Goldthwaite, where it arrived on the 17th day of January, 1902.

That thereupon said Samuel Hardin Grain Company tendered to the defendant in payment of freight charges on said corn the sum of $82.50, that being the full compensation to the defendant and the Texas & Pacific Railway Company which had been fixed by the railroad commission of Texas for the transportation of said 66,000 pounds of corn by said companies, from Texarkana to Goldthwaite, Texas.

That the defendant, its officers and agents, refused to accept the said sum of $82.50 in payment of such freight charges, and with the full knowledge that the said sum of $82.50 amounted to 12½ — per one hundred pounds on said 66,000 pounds of corn and that that was all the defendant and the Texas & Pacific Railway Company were authorized to charge for the services rendered in transporting said corn from Texarkana to Goldthwaite, wilfully demanded, collected and received from and compelled the Samuel Hardin Grain Company to pay to it for the transportation of said 66,000 pounds of grain from Texarkana, to Goldthwaite, Texas by it and the Texas & Pacific Railway Company, the sum of $165.

That that part of the railroad of the *State of* Texas & Pacific Railway Company which is between Texarkana and Fort Worth, and that part of the defendant's railroad which is between Fort Worth and Goldthwaite, is entirely within the State of Texas, and that said car load of corn was shipped from a point within the State of Texas, (Texarkana) to a point within the State of Texas, (Goldthwaite.)

That upon complaint of the extortionate charge made by the defendant as herein set out, the railroad commission of Texas investigated the same and having found such violation to be wilful, reported the same on the 6th day of February, 1902, with the facts in their possession, to the attorney general of the State and directed him to institute this suit to recover the penalty for the extortion practiced; that this suit is brought under the direction of the railroad commission of Texas.

That in consequence of the acts charged the defendant has been guilty of extortion and has thereby forfeited, promised and
5 become liable to pay to the State of Texas the sum of five thousand dollars, ($5,000).

Premises considered plaintiff prays that the defendant be cited to answer this petition, and upon hearing for a judgment for a full amount of said $5,000.00, for costs, and for all other and further relief which the court may see proper to award.

C. K. BELL,
Attorney General, Counsel for Plaintiff,
The State of Texas.

Filed March 8th, 1902.
W. D. McVEAN,
District Clerk.

First Amended Original Answer.

Filed July 10th, 1902.

In the District Court of Tarrant County, Texas.

THE STATE OF TEXAS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY. } No. 21600.

Now comes the defendant, The Gulf, Colorado & Santa Fe Railway Company, and leave of the court being first had, files this its first amended original answer in lieu of its original answer heretofore filed on the 13th day of May, 1902, as follows, to-wit:—

I.

Defendant excepts to plaintiff's petition and says same is insufficient in law and of this prays judgment of the court.

J. W. TERRY AND
COWAN, BURNEY AND LEE,
Attorneys for the Defendant.

II.

For answer herein, if answer be required, this defendant denies all and singular the allegations in plaintiff's petition contained, and says it is not guilty of the wrongs, injuries and trespasses complained of, and of this it puts itself upon the country.

6

J. W. TERRY AND
COWAN, BURNEY & LEE,
Attorneys for Defendant.

III.

For further answer herein this defendant specially denies that the shipment of sacked corn in plaintiff's petition mentioned, was a shipment from Texarkana in the State of Texas to Goldthwaite in the State of Texas; but, to the contrary, this defendant avers the facts to be that the said car of corn, together with another car of corn, was purchased by the consignees of said two cars of corn, to-wit, Saylor & Burnett of Goldthwaite, from the Samuel Hardin Grain Company in the city of Kansas City in the State of Missouri, for shipment at the time of purchase to Goldthwaite in the State of Texas, and that the said grain was sacked and loaded upon said cars and was delivered to the Kansas City Southern Railway Company, or some other carrier in the city of Kansas City, State of Missouri, on or about the 31st day of December, 1901, under and in pursuance of the contract of sale to Saylor & Burnett and to fill this

order for transportation and delivery to Saylor and Burnett at Goldthwaite, Texas.

That while the bill of lading of said corn at Kansas City may have been originally taken out at Kansas City, Missouri, and while the consignor may have billed said shipment to Texarkana, Texas only; and while new bills of lading for said shipment may have been executed by the Texas & Pacific Ry. Co. at Texarkana, Texas, covering the transportation of said corn from Texarkana, Texas, to Goldthwaite, Texas, defendant avers the facts to be that from the date and time that said corn was sacked, as defendant avers it was sacked at Kansas City and as it was sacked in pursuance of the order of Saylor & Burnett, and from the time it was loaded on the cars at Kansas City, and from the time it left Kansas City, it was intended by the said Samuel Hardin Grain Company to be carried to and be delivered to Saylor & Burnett at Goldthwaite, Texas, in pursuance of the sale to them and that in truth and in fact it was carried on one continuous journey from Kansas City, Missouri, to Goldthwaite, Texas, and that it was in fact not intended to be unloaded, or its transit to be disturbed at Texarkana, Texas; and that it was not
7 in fact unloaded or transferred from the cars in which it was loaded at Kansas City, or the seal of the said cars broken in transit; and that it was, as was the original intention of the parties when it was loaded on the cars at Kansas City, carried through under the same seals through and beyond Texarkana, and carried on to Goldthwaite, Texas, and there delivered to Saylor & Burnett. That in truth and in fact said shipment was at all times from the time it was loaded on the cars at Kansas City, Missouri, and was intended to be, a shipment from Kansas City, Mo., to Goldthwaite, Texas, and that from the time and after the time the said corn was loaded on the cars at Kansas City, Mo., it belonged to and was the property of Saylor and Burnett of Goldthwaite, Texas, who were the legal owners and consignees thereof, and to whom it was consigned. That it was at all times intended that it should be transported to Goldthwaite, Texas.

This defendant shows that the said corn in order to move from Kansas City, Mo., to Goldthwaite, Texas, had to pass through a portion of the State of Missouri, a portion of the State of Kansas, part of the Indian Territory, a portion of the State of Arkansas and a portion of the State of Texas. Wherefore this defendant avers that by reason of the premises this shipment was a transaction of interstate commerce, and was subject to the exclusive regulation and control under the Constitution of the United States of the laws of Congress, and under the Constitution of the United States the rate of freight to be charged by this defendant for the transportation of said corn from Kansas City, Mo., to Goldthwaite, Texas, or from Texarkana, Texas, to Goldthwaite, Texas, was and is not subject to the laws of the State of Texas; and if the laws of the State of Texas be construed or the commission rules or rates thereunder be construed to apply to this transportation and transaction, the same are contrary to the Constitution and laws of the United States which

give to Congress the exclusive power to regulate the commerce among States, and the defendant here specially claims its exemption under the Constitution of the United States and the regulation and control of this transaction as interstate commerce, by Con-
8 gress, from the laws of the State of Texas, and of its railroad commission, and the regulations and rules prescribed by the said commission, and specifically avers that the right claimed herein by the State of Texas or its laws or its commission to prescribe the rate of charge this defendant should make for the transportation of the shipment in question, or to prescribe a penalty against this defendant for charging more than the said rate, is contrary to the Constitution and laws of the United States; the former of which gives Congress the exclusive power to regulate commerce among the States, while the latter has prescribed the regulations for interstate commerce, which the Congress of the United States should deem necessary.

Defendant further says that the railroad commission rate as alleged in plaintiff's petition has no application whatsoever to the shipment in plaintiff's petition described, the same being a matter of interstate commerce. Wherefore this defendant says defendant has not been guilty of any violation of any law or rate of the said railroad commission.

Defendant further says that if the said shipment was in truth and in fact billed from Kansas City, to Texarkana, Texas, and that at said Texarkana, Texas, a new bill of lading was taken out from the Texas & Pacific Railway Company covering the shipment of said car of corn from Texarkana, Texas, to Goldthwaite, Texas, then this defendant says that such billing from Kansas City to Texarkana, and rebilling from Texarkana to Goldthwaite, was with the fraudulent intent and purpose on the part of the shippers of said corn, to cover up the real and true character of said shipment and give it the appearance of a shipment only from Texarkana to Goldthwaite, when in truth and in fact from the time it left Kansas City, it was intended for Goldthwaite, and that such billing was with the fraudulent intent and purpose of avoiding the interstate rate on said shipment, and with the intent and purpose of getting an unlawful and reduced rate by making the said shipment appear to be a State shipment, when it was in truth and in fact an interstate shipment.

That the action and conduct of the shippers, consignees and all of the parties interested therein, was in express violation of the terms of the laws of the United States and the acts of Congress,
9 particularly the act known as "An act to regulate commerce," being popularly known as the interstate commerce law, and particularly section 7 thereof, and that to have applied the said State commission rate alleged by plaintiff to said shipment would have made this defendant liable to the penalty denounced by the act of Congress aforesaid, against any attempt to cover the interstate character of a shipment, and make it appear to be a State

shipment, when it was in truth and in fact a subject of interstate commerce.

Having fully answered this defendant prays that it may be hence discharged with the costs.

COWAN, BURNEY & LEE,
Attorneys for Defendant.

IV.

For further and separate answer herein this defendant specifically denies that in receiving or contracting to deliver the said corn at Goldthwaite, as in plaintiff's petition alleged, that the Texas & Pacific Railway Company was the agent of this defendant or was authorized to contract for or on behalf of this defendant for the delivering of the said corn by this defendant at Goldthwaite; and this defendant avers that the facts are that the said Texas & Pacific Railway Company had no authority to act for this defendant in said matter whatsoever; that this defendant's only connection with the said Texas & Pacific Ry. Co. in said matter was that under the provisions of the interstate commerce law, it agreed with the said Texas & Pacific Ry. Co. on what proportion of certain established through rates it would accept for its haul on certain commodities from Forth Worth to points on its line of railway, including among others, Goldthwaite, Texas, that said rates were established in conformity to the provisions of the interstate commerce law by the publication of the tariffs, filing of the same with the Interstate Commerce Commission etc., and that the said Texas & Pacific Ry. Co. never had any authority from this defendant to contract or agree to haul any shipments at any other or different rates than established by law, and never had any authority from this defendant to contract or agree that the interstate commerce should be treated or handled as State commerce, or that it should not be subject to the rates applied to interstate commerce, and had no authority from the defendant to act for it in such matters. That as by law required, this defendant only handled and carried interstate commerce at the rates established for such freight under the interstate commerce law and only handled interstate commerce at the legally established rates for such commerce, and that neither the Texas & Pacific Railway Company or any other railway company or any other person had authority to act for this defendant or bind it for the transportation of freight at any other or different rate or any other or different conditions.

Having fully answered this defendant prays judgment for its costs.

COWAN, BURNEY & LEE AND
J. W. TERRY,
Attorneys for Defendant.

THE STATE OF TEXAS, }
County of Tarrant. }

P. H. Goodwyn being first duly sworn on oath deposes and says that he has read paragraph four of the above preceding answer, and that the facts therein stated are true. That he is the general freight agent of the defendant, The Gulf, Colorado & Santa Fe Railway Company, and authorized to make this affidavit.

P. H. GOODWYN.

Sworn to and subscribed before me by said P. H. Goodwyn, this the 10th day of July, 1902.

[L. S.] M. E. GRIFFITHS,
Notary Public in and for Tarrant County, Texas.

Filed July 10th, 1902.

W. D. McVEAN,
District Clerk.

11 Conclusions of Law and of Facts.

Filed July 28th, 1902.

In the District Court of Tarrant County, Texas.

THE STATE OF TEXAS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY. } No. 21600.

Complying with a request of defendant, I herewith file my findings of fact and conclusions of law upon the trial of the above entitled cause.

Findings of Facts.

I.

The railroad commission of Texas, after due notice of the time and place where the rates would be fixed by it, fixed and established the rates which might be charged by a railroad or by two or more lines of railroad, whether under the same management and control or not, for the transportation of corn, between points within the State of Texas, in car load lots at 12½ cents per one hundred pounds for a distance of over 165 miles, which rate became effective on March the 10th, 1899, and remained effective until the present time, of which action the defendant and the Texas & Pacific R. R. Company received legal notice before the rates prescribed became effective.

II.

The distance from Texarkana, Texas, to Goldthwaite, Texas, over the Texas & Pacific railway to Fort Worth and from Fort Worth over the G. C. & S. F. railway to Goldthwaite, Texas, is more than 165 miles.

III.

The Texas & Pacific Railway Company owns and operates a railroad from Texarkana, Texas, to Fort Worth, Texas, and the defendant from Fort Worth, Texas, to Goldthwaite, Texas, and each of these points and all intermediate points on each of said roads are entirely within the State of Texas.

IV.

12 The Texas & Pacific Railway Company executed a bill of lading dated Texarkana, Texas, January 13, 1902, which bill of lading purported to acknowledge the receipt from the Samuel Hardin Grain Company at Texarkana, Texas, of one car of sacked corn, same being car 3845 P. & G. and which bill of lading purported to show that the said corn was consigned to shippers order notify Saylor & Burnett Goldthwaite, Texas.

V.

Said carload of corn was transported by the Texas & Pacific Railway Company to Fort Worth and there delivered to the defendant, and was by it received and transported to Goldthwaite, Texas, where it arrived on the 17th day of January, 1902, and Saylor & Burnett who were acting for Samuel Hardin Grain Company tendered to the defendant's agent at Goldthwaite, $82.50 in payment of the freight charges thereon; the said agent declined to accept said amount of $82.50 in payment of said charges, and demanded $165.00 for the transportation of said carload of corn from Texarkana, Texas, to Goldthwaite, Texas.

VI.

The agent of the defendant at Goldthwaite, Texas, charged, collected, demanded and received from Samuel Hardin Grain Company $165.00 for the transportation of said carload of 66,000 pounds of corn from Texarkana, Texas, to Goldthwaite, Texas; in so charging, collecting demanding and receiving said $165.00 the said agent of the defendant was acting under instructions from the executive officers and attorneys of the defendant company, who believed and advised that said shipment was interstate commerce and his action in so doing was subsequently ratified by the defendant.

VII.

The Samuel Hardin Grain Company made complaint to the railroad commission of Texas of the action of the defendant in charging more than 12½c. per hundred pounds for transporting the said corn, whereupon the railroad commission investigated such complaint and ordered this suit to be instituted, in accordance with the provisions of article 4568 of the Revised Statutes of Texas.

VIII.

13 On December 23rd, 1901, the Samuel Hardin Grain Company at Kansas City, Mo., offered to sell Saylor & Burnett at Goldthwaite, Texas, No. 2 mixed corn at 86½ cents per bushel for delivery on ry. track at Goldthwaite and this offer was accepted for two car loads of corn. This offer and acceptance was by telegraphic communication between the parties at their respective places of business. The Hardin Grain Company did not at that time have the corn but on Dec. 24th, 1901, to fill the order it contracted with the Harroun Commission Company of Kansas City for the purchase — two 66,000 pounds cars of No. 2 mixed corn at 75½ cents per bushel to be delivered at Texarkana, Texas, to the Hardin Grain Company. Previously to this the Harroun Commission Company had contracted for the purchase of two cars of corn to be delivered to it at Texarkana, Texas, and with these two cars it expected to and did fill the order of the Hardin Grain Company. These cars had originated in Hudson S. D. The receiving carrier at Hudson was the Chicago Milwaukee & St. Paul Railway Company who issued bills of lading limiting its liability to losses occurring on its road with a like limitation of liability of all other carriers who should handle said corn in transit to its destination. By the terms of said bills of lading the corn was consigned to "Forrester Bros. Texarkana, Texas" and shipment made in cars of C. M. & St. P. Ry. Co., care of Kansas City Southern Ry. at Kansas City, Mo. with the privilege to stop the corn at Kansas City for inspection and transfer. The corn reached Kansas City on December 17th, 1901, was there unloaded, sacked and transferred to the Kansas City Southern Railway Co., who on Dec. 31st 1901, issued bills of lading reciting that the corn was loaded in cars No. 3845, P. G. and No. 4189 P. G. that same was received of Forrester Bros. and consigned as follows, "Shippers order notify Harroun Commission Company Texarkana, Texas," and reciting further that freight 14 cents per hundred lbs. was prepaid, and one of these cars to-wit, car "No. 3845 P. G." is the car in controversy in this suit.

IX.

The Harroun Commission Co. paid no freight on the corn from Hudson, S. D. to Texarkana, Texas, as it had purchased it to be delivered at Texarkana.

14 X.

The freight on the corn from Hudson, to Texarkana was as follows, 18 cents per 100 lbs. from Hudson to Kansas City and 14 cents from Kansas City to Texarkana all of which was paid by the vendors of Harroun Commission Company. The minimum interstate rate from Hudson South Dakota to Goldthwaite, Texas, was 46 cents per hundred lbs. which would have been apportioned as follows: 18 cents from Hudson to Kansas City and 28 cents from Kansas City to Goldthwaite, Texas. The G. C. & S. F. Ry. Co. the T. & P. Ry. Co. and the Kansas City Southern Ry. Co. together with other connecting lines from Kansas City, Mo. to Goldthwaite, Texas, had established a joint tariff of 35 cents per 100 lbs. on shipments from Kansas City to Goldthwaite via Texarkana and originating in Kansas City, had agreed on a division of that rate between them and had filed tariffs establishing such rate with the Interstate Commerce Commission and by such steps had brought itself within the provisions of the interstate commerce laws.

XI.

The Hardin Grain Co.'s officers kept themselves informed of interstate commission freight rates and of the State commission rates and the reason why they contracted for the corn to be delivered to them at Texarkana was because they could fill their contract with Saylor & Burnett at Goldthwaite at about 1½ cents per bushel cheaper than they could if they had bought the corn for delivery to them at Kansas City and had shipped from Kansas City to Goldthwaite. At the time of the purchase contract between the Hardin Grain Company and the Harroun Commission Company, Hardin the manager of the latter company intended that the corn to be thereby acquired should go to Saylor & Burnett and should be shipped to Goldthwaite, from Texarkana as soon as practicable, and on December 26th, 1901, two days after this contract for purchase had been made Hardin was informed that the corn with which Harroun Commission Company expected to fill his order would be sacked in Kansas City and be shipped out of Kansas City to Texarkana, but at the time of making the contract he did not know from whence the corn would come.

15 XIII.

On December 31st, 1901, the date of shipment from Kansas City to Texarkana Harroun Commission Co. informed the Hardin Grain Co. that the corn to fill the latter order had been loaded to start to Texarkana and requested instruction as to how the corn should be shipped from Texarkana for the *for the* guidance of F. L. Atkins their agent at that place who would attend to such re-shipping for the Hardin Grain Company as per former understanding. There-

upon and in compliance with such request blank bills of lading were made out by the Hardin Grain Company in Kansas City and furnished to the Harroun Commission Company to be forwarded to F. L. Adkins. These bills of lading were to be executed by the Texas & Pacific Railway Company and F. L. Adkins as agent for the Hardin Grain Company and were for shipment of the corn to Goldthwaite, Texas, consigned to "Shippers order notify &c." giving the numbers and initials of cars which information had been furnished by the Harroun Commission Company and on January 14th, 1902, the re-shipment having been made as per instructions the bills of lading duly executed by the Texas & Pacific Ry. Co. were by Harroun delivered to Hardin Grain Co., who thereupon paid the Harroun Commission Company $1779.64 the purchase price previously agreed upon for the corn and the receipt of said blank bills of lading by the Harroun Commission Company was the first information had by that company of the intended final destination and disposition of the corn.

XIV.

Neither Hardin Grain Co. nor Harroun Commission Co. had any store or warehouse at Texarkana but under the agreement between the two companies (Hardin and Harroun,) one F. L. Adkins who was the agent of the Harroun Commission Co., and stationed at Texarkana re-shipped the corn at Texarkana for the Hardin Grain Company. That shipment was to Goldthwaite, Texas, over the Texas & Pacific Ry. Co. and the G. C. & S. F. Ry. Co. by bill of lading reciting its receipt from Hardin Grain Co. and consigned to "Shippers order notify Saylor & Burnett Goldthwaite, Texas," and was transferred under original seals and without breaking packages, to the Texas & Pacific Ry. Co., after having remained in Texarkana
16 five days, the only thing done by F. L. Adkins was to surrender the Kansas City Southern bill of lading have the cars set over on the T. & P. Ry. and take a bill of lading from the latter Co. The corn reached Texarkana January 7th 1902, and was shipped out from Texarkana January 13th, 1902, the defendant was not a party to the bill of lading executed at Texarkana.

XV.

On Dec. 31st, 1901, Hardin Grain Co. mailed to Saylor & Burnett an invoice of the corn, in the form of an account stating the car No.'s and initial, the amount of corn and price to be paid by Saylor & Burnett.

Conclusions of Law.

From the foregoing facts I find that the shipment in controversy from Texarkana, Texas, to Goldthwaite, Texas, was not an interstate shipment but originating and terminating in the State of Texas,

that the amount of freight charged and collected by the defendant for said shipment was in excess of the rate fixed by the railroad commission of the State, that because of said excessive charges plaintiff is entitled to recover of the defendant a penalty of $100.00 and costs of suit and that judgment should be rendered accordingly. To all of which findings both of law and of fact the defendant in open court excepts.

IRBY DUNKLIN, Judge.

Filed July 28th, 1902.
W. D. McVEAN,
District Clerk.

Bill of Exception.

Filed July 28, 1902.

In the District Court of Tarrant County, Texas.

THE STATE OF TEXAS
vs.
G., C. & S. F. RAILWAY COMPANY.

Be it remembered that on the trial of the above entitled and numbered cause, the plaintiff offered in evidence the portion of the deposition of Samuel Hardin as follows:

In answer to the 15th Int.:

17 "They (meaning the Harroun Com. Co.) had no interest in knowing anything beyond the fact that they were to deliver us the corn in Texarkana, as their whole interest and title to the corn ceased when it was delivered to us at that point."

In answer to the 4th cross Int.:

"The car was actually delivered to us and became our property on January 14th, when they surrendered us the bills of lading covering the corn from Texarkana to Goldthwaite."

To all of which portions of said answers, in which the witness undertook to testify as to when the title to the corn passed and when the property in the corn vested in the Hardin Grain Company the defendant objected on the ground that the question of when the title passed was a question of law and was for the court; which objection was by the court overruled, and the testimony admitted, to which ruling of the court the defendant then and there objected, and now here tenders this its bill of exceptions No. —, and prays that the same may be allowed in the terms of law and made a part of the record in this cause.

Approved with the following explanation:

The evidence was admitted as tending to show the understanding of the parties to the transaction, and independent of said testimony the court found the title to the corn did not pass to the Hardin

Grain Company until it reached Texarkana and was there delivered to the Hardin Grain Company.

IRBY DUNKLIN, Judge.

Judgment.

Filed July 28th, 1902.
W. D. McVEAN,
District Clerk.

THE STATE OF TEXAS
vs.
GULF, COLORADO & SANTA FE RAILWAY Company. } No. 21600. Judgment, July 21st, 1902.

On this the 10th day of July A. D. 1902, this cause came
18 on for trial whereupon both parties appeared by counsel and announced ready for trial and a jury having been waived submitted the matters of controversy as well *as* of fact as of law to the court and the court having heard the evidence and the argument of counsel took the cause under advisement and subsequently to-wit: on the 21st day of July A. D. 1902 the further consideration of the case was resumed and because it is the opinion of the court that the law is with the plaintiff, it is therefore considered ordered and adjudged by the court that the plaintiff The State of Texas do have and recover of and from the defendant the sum of one hundred dollars and all costs in this behalf expended, for which execution may issue. To which judgment the defendant excepted and in open court gave notice of appeal to the court of civil appeals of the second supreme judicial district of Texas.

It is further ordered that the parties have ten days after adjournment of court in which to prepare and file a statement of facts.

Statement of Facts.

Filed August 4th, 1902.

In the District Court of Tarrant County, Texas.

THE STATE OF TEXAS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY. } No. 21600.

Be it remembered that upon the trial of the above numbered and entitled cause the following evidence was introduced.

The State of Texas by its counsel offered in evidence an agreement between counsel for plaintiff and defendant as follows:

I.

The railroad commission of Texas, after due notice of the time and place where the rates would be fixed by it, fixed and estab-

lished the rates which might be charged by a railroad or by
19 two or more lines of railroad, whether under the same management and control or not, for the transportation of corn, between points within the State of Texas, in car load lots at 12½c. per one hundred pounds for a distance of over 165 miles, which rate became effective on March 10th, 1899, and remains effective until the present time, of which action the defendant and the Texas & Pacific R. R. Company received legal notice before the rates prescribed became effective.

II.

The distance from Texarkana, Texas, to Goldthwaite, Texas, over the Texas & Pacific railway to Fort Worth and from Fort Worth over the G. C. & S. F. railway to Goldthwaite, Texas, is more than 165 miles.

III.

The Texas & Pacific Railway Company owns and operates a railroad from Texarkana, Texas, to Fort Worth, Texas, and the defendant from Ft. Worth, Tex., to Goldthwaite, Tex., and each of these points and all the intermediate points on each of said roads are entirely within the State of Texas.

IV.

The Texas & Pacific Railway Company executed a bill of lading dated Texarkana, Texas, January 13, 1902, which bill of lading purporting to acknowledge the receipt from the Samuel Hardin Grain Company at Texarkana, Texas, of one car of sacked corn, same being car 3845 P. & G. and which bill purported to show that the said corn was consigned to shipper's order notify Saylor & Burnett, Goldthwaite, Texas.

V.

Said car load of corn was transported by the Texas & Pacific Railway Company to Fort Worth and there delivered to the defendant, and was by it received and transported to Goldthwaite, Texas, where it arrived on the 17th day of January, 1902, and Saylor & Burnett who were acting for Samuel Hardin Grain Company tendered to the defendant's agent at Goldthwaite, $82.50 in payment of the freight charges thereon; the said agent declined to accept said amount of $82.50 in payment of said charges, and demanded $165.00 for the transportation of said load of corn from Texarkana, Texas, to Goldthwaite, Texas.

20 VI.

The agent of the defendant at Goldthwaite, Texas, charged, collected demanded and received from Samuel Hardin Grain Company $165.00 for the transportation of said car load of 66,000 pounds of

corn from Texarkana, Texas, to Goldthwaite, Texas; in so charging, collecting demanding and receiving said $165.00 the said agent of the defendant was acting under instruction from the executive officers of the defendant company, and his action in so doing was subsequently ratified by the defendant.

VII.

The Samuel Harding Grain Company made complaint to the railroad commission of Texas of the action of the defendant in charging more than 12½c. per hundred pounds for transporting the said corn, whereupon the said railroad commission investigated such complaint and ordered this suit to be instituted, in accordance with the provisions of article 4568 of the Revised Statutes of Texas.

VIII.

Nothing herein contained shall be so construed as to preclude the defendant from proving or contending that the said car of grain was not a *bona fide* shipment from Texarkana, Texas, but originated beyond Texarkana, Texas, in some other State or Territory than Texas, and was intended, before it crossed the Texas line, to be shipped to Goldthwaite, Texas, and that a bill of lading was procured at Texarkana, Texas, and the car re-billed from that point as a mere shift or pretext for the purpose of attempting to secure the application of the Texas commission rates, which said rates are not applicable to interstate shipments.

The bill of lading attached to the agreement was as follows:

21 Form 1587.

The Texas & Pacific Railway Company.

Bill of Lading. No. —.

Rates.

From *Texarkana, Tex* .. ..
To *Goldthwaite, Tex* .....

Route.

Via.....
Via.....
Charges advanced, $— ....
If 1st class .....per 100 lbs.
If 2nd class.... per 100 lbs.
If 3rd class ....per 100 lbs.
If 4th class .... per 100 lbs.
If 5th class ....per 100 lbs.
If class A ..... per 100 lbs.
If class B .... per 100 lbs.
If class C ..... per 100 lbs.
If class D ..... per 100 lbs.
If class E ..... per 100 lbs.

TEXARKANA, TEX., Station, 1/13, 1902.

Received from Samuel Hardin Grain Co. the following packages, value and contents unknown, in apparent good order, marked and numbered for the purpose of identification as per margin hereof, to be transported to —— and there delivered at the usual and customary place of discharge or transfer of car, in like order and condition, to —— (or to a connecting carrier if destined beyond) on payment of all charges thereon in lots or parts of lots as delivered upon the following terms and conditions, which are assented to and accepted by the owner, viz:

1. The liability of the Texas & Pacific Railway Company in respect to said property and under this contract is limited to its own line of railway, and will cease and its part of this contract be fully performed upon delivery to its next connecting carrier, of the articles mentioned herein and receipted for hereby; and in case of any loss, detriment or damage done to or sustained by any of the property herein receipted for before its arrival and delivery at its final destination whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the property shall be at the time of such damage, detriment or loss.

2. That the rate of freight for transportation of said property specified in the margin hereon is quoted and guaranteed with the distinct understanding, and only on condition that the class and character of the contents and the weight of the packages hereby receipted for and referred to herein are truly and correctly represented and stated; that the weights and class specified hereon are only approximated, and correct weights and classifications are to be ascertained, and collections of charges made at destination accordingly; that said rate only includes charge for transportation, and the specification of said rate shall not be taken as any guide for construction, or evidence to extend this contract in other respects, or to bind the Texas & Pacific Railway Company to transport or to become in any wise responsible for said property after delivery thereof to its next connecting carrier, but shall only bind said company to protect said rate.

3. "That neither the Texas & Pacific Railway Company nor any connecting carrier handling this shipment shall be liable for damage to or destruction of said property by fire, nor for any loss or depreciation in weight or quality thereof, nor for any damage or injury thereto caused by rust, moisture, heat, cold, dust, dirt, nor by chafing or breaking of furniture, breaking of glass, crockery, earthenware, pottery, stoves, machinery, and agricultural implements, leaking of casks, barrels and cases, bursting or breaking of packages, boxes, bundles, barrels cases and bags, nor for natural decay and deterioration, nor for perishable property of any kind caused by
22 delays from any cause, or by weather or exposure, nor for loss or damage of any kind, to property which it is necessary on account of bulk, to transport on open cars, nor for loss or damage by collision or any of the other dangers of navigation while on seas, gulfs, lakes, rivers and canals.

4. That if the property hereby receipted for, or any part thereof, shall be lost or destroyed by means or under circumstances rendering the Texas & Pacific Railway Company or any connecting carrier liable therefor, the damages recoverable therefor shall be computed at its value at the time and place of shipment as evidenced hereby.

5. That no suit or action against the Texas & Pacific Railway Company on any claim for damages arising from any breach of this contract, or injury to or loss or destruction of the property mentioned and receipted for hereby, shall be sustained in any court

unless notice in writing, distinctly setting forth the claim shall be given to the nearest or any other convenient local agent of said railway company before the expiration of ninety days from the date of accrual of such claim; and in no event shall any suit or action in any court for damages arising from any breach of this contract, or for damage or injury to, or loss or destruction of said property, or any part thereof, be sustained unless the same shall be commenced before the expiration of two years from the date when such breach, injury, loss or destruction occurred; and the lapse of such time shall be conclusive evidence against the validity of such claim and demand.

6. That neither the Texas & Pacific Railway Company nor any connecting line transporting said property shall be liable for wrong carriage or wrong delivery of any of said packages or property that are marked with initials or numbers, or that are imperfectly marked, or that are without marks.

7. That the validity of the provision of this contract restricting the liability of the carriers shall be tested by the rules of the common law relating to the contracts of a similar character, as recognized and followed by the Supreme Court of the United States.

8. That the acceptance of this bill of lading shall be deemed conclusive proof of the assent of the owner of said property to all the terms and conditions written or printed thereon.

In witness whereof, the agent of the Texas & Pacific railway hath affirmed to — bill of lading of this tenor and date, one of which being accomplished, the other to stand void.

Marks.	List of articles.	Weight.
Shippers order. Notify Saylor & Burnett, Goldthwaite, Texas, c/o G. C. & S. F.	Sacked corn Car 3845 P. & G. J. A. Morgan, agent. (Stamp duly cancelled.)	

[Written across the face:] Original.

23 The words "Samuel Hardin Grain Co." in the original bill of lading immediately after the words "Received from" are inserted with rubber stamp and the words "Shippers order notify" under the heading "Marks" is also put in with rubber stamp; the balance of the blanks and the writing on the original bill of

lading is indelible pencil except (1) in the first line "1/13" and "2"; and (2) the signature of the agent, which are in pen.

State rests.

Samuel Hardin by Deposition.

The defendant offered in evidence the deposition of Samuel Hardin, its counsel stating at the time that Hardin was the party at whose instance the suit was brought and that he was *the* really the party adversely interested and that defendant offered his evidence as that of a necessarily adverse witness but one whom defendant was bound to call to develop the facts.

The witness testified:

This suit is brought by the attorney general of the State of Texas as a result of a complaint made by our firm to the railroad commission of the State of Texas in regard to the amount of freight charged by the G. C. & S. F. Ry. Co., on the shipment in controversy. On February 7th, 1902, I wrote to Hon. Allison Mayfield of Austin, Texas, a letter in which I undertook to state the circumstances under which the overcharge was made, and in which I stated that I would be glad to give my deposition at any time I might be called upon therefor. It is a fact that I am directly interested in this suit and I am willing to aid the State in any way that I can.

The Samuel Hardin Grain Company does not own any warehouses nor does it keep any grain in store. The nature of our business is that of soliciting orders from Kas., Mo., I. T., Tex., and other States and when such orders are received to buy the commodities and fill such orders as quickly as possible. We had no grain on hand in warehouses on Dec. 23rd, 1901.

It is a fact that on December 23rd, 1901 I wired Saylor and Burnett of Goldthwaite, Texas, offering them No. 2 mixed corn
24 at 86½ cts. track Goldthwaite and on the same date received by wire an acceptance from them for two carloads and so entered their order.

The sale of this corn was predicated on my own knowledge of what I could buy the grain for both in Kansas City, Mo., and Kansas City territory and also what I could buy the corn for in Texarkana, Texas, and on my knowledge of the rates applying from Kansas City, Mo., to Goldthwaite, direct, and also on my knowledge of the rates which obtained via Texarkana gateway and my knowledge of the rates as prescribed by the railway commission of the State of Texas for Texas points particularly points on the Lampasas branch of the G. C. & S. F. Ry., including Goldthwaite, Texas. It is a fact that I am more or less familiar with the rates applying from all the territory tributary to Kansas City to Texas points it being in the line of my business to possess such information. I am familiar with the rates of the railroad commission of Texas from Texarkana to Texas points. It is not a fact that I sold the corn with the intention of shipping it from any particular point nor that I

made the quotation with any view or knowledge of where I obtained the corn at the time sale was made. When we bought the corn to fill the order for Saylor & Burnett of Goldthwaite, Texas, we bought some f. o. b. Texarkana, Texas, and had nothing whatever to do with the corn until it was delivered to us at that point and had no knowledge of where the corn would originate, and no expectation as to whether it would go through Texarkana from a point outside of the State or whether it would be delivered to us from an elevator in Texarkana.

No. 2 corn sold at 68½ cts. f. o. b. cars *cars* Kansas City, on Dec. 23rd, 1901.

It is a fact that I bought the two cars to fill this order from the Harroun Comm. Co., on the 24th day of Dec. 1901. We contracted to pay 75½ cts. per bu. f. o. b. Texarkana, Texas, when the corn should be delivered to us at that point. At the time purchase was made we had no knowledge as to the point from which the corn would be shipped only that it was to be delivered to us at Texarkana, Texas. At the time the two cars of corn were bought from the Harroun Commission Co. they had no knowledge as to
25 where the corn was going but on Dec. 31st, they advised us that they had two cars of corn which they intended to give us on the order in question and as *to* their representative in Texarkana, Texas, had to have the bills of lading in hand for the shipment of this corn from Texarkana, Texas, to its destination, they asked us for our billing on the corn, which we furnished them and they attended to having the billing executed for us from Texarkana, Texas, to Goldthwaite, Texas.

I do not mean that I or my firm have any financial interest in this suit but merely that I feel an interest in seeing the case prosecuted and the stand taken by the railroad commission of Texas upheld.

The cars were loaded and shipped from Kansas City, Missouri, and were billed to Texarkana, Texas; they were not billed by us nor to us. It is not a fact that by shipping the corn through Texarkana or from Texarkana that we could get to Goldthwaite cheaper than by billing corn direct from Kansas City. As a matter of fact, the rates which applied via Texarkana, Texas, to Goldthwaite were not one and a half cents per hundred higher than the minimum balance of the rate applying from Kansas City, to Goldthwaite.

Eighth interrogatory. Now, if you undertake to say that you bought these two cars from the Harroun Commission Company at a certain rate per bushel, delivered f. o. b. the cars at Texarkana, then state if it is not a fact that if you made any such arrangement or agreement with the Harroun Commission Company, that it was only in pursuance of a purpose and intention on your part, in which the Harroun Commission Company was willing to aid you, to get the benefit of the Texas State Railroad Commission rate. And — it is not a fact that, if the interstate rate to Goldthwaite had been lower that

the Texas Railroad Commission rate to Texarkana, that you would have had the Harroun Commission Company to ship the corn under a through way-bill to Goldthwaite?

Is it not a fact that you control and did control the billing of the cars just as you wanted it?

26 Is it not a fact that it was a matter of indifference with the Harroun Commission Company where they delivered you the grain,—whether at Texarkana, Kansas City, point of shipment or Goldthwaite?

If you undertake to say that the facts are not correctly set forth in any of the particulars set forth in this interrogatory, then state fully and particularly what the facts are.

To which interrogatory the witness answered.

(1.) In buying corn from the Harroun Commission Company we have no arrangement or agreement with them further than that they were to deliver the corn to us at Texarkana, and receive so much per bushel for the corn when such delivery was made, and at the time of purchase they had no knowledge of what we intended to do with the corn. We bought the corn delivered at Texarkana, Texas, for the purpose of filling the order we had with Saylor and Burnett at Goldthwaite, Texas, and did employ the Texas State railroad commissioner's rate from Texarkana, Texas to Goldthwaite. The Harroun Commission Company maintained an office at Texarkana, Texas, and had a representative there to transact their business at that point. They had grain in transit to Texarkana and at Texarkana almost continuously during the time that this purchase was made, and our object in buying the corn at Texarkana was for the purpose of expediting the shipment and delivery — the goods and not for the benefit of obtaining a cheaper rate to Goldthwaite than could have been obtained by shipping corn direct from Kansas City, to Goldthwaite.

(2.) It is not a fact that we controlled the billing of these cars, until after the corn was delivered to us at Texarkana, Texas.

(3.) Under the terms of our purchase the Harroun Commission Company could not deliver us the corn at any other point than at Texarkana, Texas.

(4.) My answer to the foregoing questions under this interrogatory, I think fully set forth the facts connected with these shipments.

The ninth interrogatory to the witness was:—

Is it not a fact that you did not have any office at Texarkana, and that the Harroun Commission Company had no office at

27 Texarkana, and that neither of you had an agent at that point, and that neither of you were engaged in business at that point, but that you conducted your business in Kansas City? If you undertake to say that either of you had an agent at Texarkana, is it not a fact that such agent represented you only for the purpose of going to the Texas & Pacific railroad, or some other

railroad out of Texarkana to get from such railroad a bill of lading on cars of grain shipped through to them? Who was such agent.

Why did you desire to have the cars delivered to you f. o. b. at Texarkana, Texas? Is it not a fact that you had not sold the cars at that point? Is it not a fact that the only reason for having them billed to Texarkana, Texas, was to avail the Texas Commission rate from there on? If not why did you have them billed to Texarkana, Arkansas; or why did you not have them billed to Fort Worth, Texas? State fully your reason for not having them billed to Fort Worth, Texas, and having them billed to Texarkana, Texas? Why did you not have them billed to Pittsburg, Kansas, or to some station on the Southern Kansas or G. C. & S. F. Ry. Co. in the Indian Territory and pay for them f. o. b. at that point? Why would not it have been just as satisfactory to you to receive the grain at any of the points named as at Texarkana, Texas, except for the fact that by billing them to Texarkana, Texas, you could avail of the Texas Railroad Commission rate? Now, if you undertake to say that your having the stuff billed to you f. o. b. at Texarkana, Texas, was not for the sole and only purpose of getting the benefit of the Texas Commission rate, you will please refer to your letter books, and to a letter that you wrote under date of October 23rd, 1901, to L. L. Shield-, Santa Anna, Texas, you will kindly attach a true copy of that letter to your answers to these interrogatories and have the notary *make* the same for identification. Is it not a fact that you dictated that letter, and is it not a fact that in said letter you stated,

"We here with forward you invoice for car of corn No. 4051 B. G.
"Which was forwarded to you on the 18th instant and should reach you in due course of transportation. This corn, you understand, has to be re-billed at Texarkana, and does not go through as
28 promptly as other shipments would, but in order to reach you at those prices it has to be billed in this way."

Now, explain what you meant by this language. If this shipment of the stuff to you at Texarkana, Texas, f. o. b. and re-billed at that place was not a mere subterfuge and scheme to evade the interstate character of the shipment and so get a lower rate, then explain fully what your letter and language to Shealds meant, if it did not mean that. From whom did you buy the corn sold to L. L. Shields referred to in said letter and when? Give dates. From what point was it ship- to Texarkana?

Who gave the direction for rebilling the Shields shipment from Texarkana. Did you not direct the parties from whom you bought the grain to have it rebilled to L. L. Shields at Santa Anna? Give the name and present residence of the party from whom you bought the Shields grain.

Now, did you not write letters of similar purport to Saylor and Burnett? Please attach to your answers copies of all letters you wrote to Saylor and Burnett from the first of September, 1901, to the first of January, 1902. Have you done so? Are the copies at-

tached true copies? If you do not attach copies state why you do not.

Now, is it not a fact that you wrote letters of similar purport to that one written Shields to grain merchants at all points along the Lampasas branch of the Santa Fe railroad, during the fall and winter of 1901, and that you were competing for business in that section on the basis of billing the stuff to Texarkana, Texas, with a view of evading the interstate rate and getting the Texas Commission rate?

If you say that any of the matters inquired about are not correctly stated in this interrogatory, state fully what are the facts with reference to such matters.

To which he answered:—

We had no office or agent at Texarkana and we were not engaged in business at that point and our business is conducted mainly in Kansas City. The Harroun Commission Company did main-
29 tain an office at Texarkana, a representative F. L. Adkins, who attended to their business at Texarkana, and who attended to having the bills of lading executed by the T. & P. railway at Texarkana, Texas, to Goldthwaite, Texas, for the two shipments of corn in question. I do not know what the duties of Mr. Atkins were further than above stated. (2.) We desired to have these cars delivered to us at Texarkana, Texas, because we thought at the time of purchase we could get hold of the corn there at an earlier date and consequently make an earlier delivery at Goldthwaite than we could by waiting to buy the corn at Kansas City for direct shipment to Goldthwaite. It is true that we had not sold any corn at Texarkana. We had the corn delivered to us at Texarkana, Texas, because it was the most available point at which we could have same delivered and because we believed we could make the delivery at an earlier date than by having them delivered to us at other points, and because we could have the shipment made from Texarkana, based on the Texas railway commissioners' rate. (3.) We wrote the letter to L. L. Shields set out in question and in that letter we used the language quoted At the time that shipment was made a ten cent rate on corn obtained from Kansas City to Texarkana, Texas, which, added to the commissioner's rate, from Texarkana, Texas, to Santa Anna, Texas, did make a lower rate combination to that point than the through rate applying from Kansas City to Santa Anna, Texas. Santa Anna, Texas, is in what is known as group 4 Texas, and the minimum balance from Kansas City to Santa Anna is 28 cents per hundred on corn, but the same is not true on shipments destined to Goldthwaite, Texas; and we made the Shield- shipment to Santa Anna via Texarkana gateway for the purpose of getting the benefit of the cheaper rate, and this is what is meant by the letter.

(4.) We bought the car of corn 4051 P. G., which was shipped to L. L. Shield-, Santa Anna, Texas, from the Merchant Elevator Company of Kansas City on October 17th, 1891, as per our record. The

car was shipped from Kansas City Missouri, to Texarkana. We fail to find among our records to whom the order was given to rebill the above car of corn from Texarkana, Texas, to Santa Anna,
30 Texas, but we know that it was not the Merchant Elevator Company. As stated above we bought the Shields grain from the Merchant's Elevator Company, of this city. The address of the proprietor is J. S. Smith, Kansas City, Missouri, but who is now out of the cash grain business. We have attached copies of all our letters to Saylor and Burnett of Goldthwaite, Texas, written between the dates of September 1st, 1901, and January 1st, 1902, which are correct copies of said letters. It is impossible for me to state from memory to whom we wrote letters during the fall and winter of 1901 and what their purport or contents were. It is true we were competing for business over a good portion of the State of Texas, basing our prices on shipping either direct from Kansas City or through the Kansas City gateway, whichever we could do most promptly or cheaply. To most points in group-3-Texas, especially Goldthwaite, there was very little difference in the cost of transportation either direct from Kansas City or St. Louis or via Texarkana gateway. We did not bill stuff via the Texarkana for the purpose of evading the interstate rate, as in most instances the interstate rate was slightly cheaper than the combination via Texarkana, but did so for expediency.

Continuing witness testified:—

It is true we were engaged in selling grain in Texas during the fall and winter of 1901 and that there was reported to be a shortage of corn in that State, and we sold more or less grain to Texas parties. Most of the grain we sold in Texas was bought either in Kansas City or St. Louis, Missouri, or Cairo, Illinois, or Texarkana, Texas. We solicited orders from Texas merchants for grain to be delivered — their stations, and that when orders were received we would go into the open market and buy from whoever and whenever we could buy the cheapest, transportation to destination considered; and we would have the grain billed either direct to destination or delivered to us either at point of origin or at some intermediate point, according to which was most expedient or cheapest, price and rates considered.

(3.) So far as my memory serves me, all the corn we bought was bought from people outside of the State of Texas, but we
31 seldom knew where the corn was to come from: it was a matter of no importance to us where the corn was grown. When we bought the corn from the Harroun Commission Company on December 24th, to fill the order for Saylor & Burnett at Goldthwaite, Texas, they were merely verbal. Two days later, however, the Harroun Commission Company confirmed the purchase in writing, copy of which is hereto attached. We did not give any shipping instructions to the Harroun Commission Company at the time purchase was made, further than to advise them that we desired this corn to

be delivered to us at Texarkana, and this was done orally. All the orders and instructions on this corn was given by me personally.

We bought this grain from the Harroun Commission Company on December 24th, 1901, to be delivered to us at Texarkana, Texas and on December 31st the Harroun Commission Company advised us and also rendered us an invoice as a memorandum of the car numbers, initials and the amount of corn contained in the cars, which they intended to deliver us at Texarkana, Texas, as per contract for said corn, and these invoices were furnished that we might know at as early a date as possible what corn they intended to give us to fill their contract of December 24th: and we presume that the time intervening between December 24th and December 31st, 1901, was the time required by them to decide on what corn they would give us, and in getting same loaded into cars. On receipt of information as to what corn they intended to deliver to us, which was given on December 31st, we furnished the Harroun Commission Company bills of lading made out from Texarkana, Texas, to Goldthwaite, Texas, via T. & P. and G. C. & S. F. railways, as they maintained a representative at Texarkana, who they were willing should attend to the rebilling of the grain out of Texarkana for our account and because they desired to retain possession of such bills of lading until we had made payment to them for the corn in question. There was no round-about way to the transaction. It was simply the proper and business way for them to handle the transaction and maintain possession of the property until they had received check from us for the corn. It is true that we did not buy the corn from the Harroun Commission Company until after we had received the order from Saylor & Burnett, and that we
32 bought the corn to fill said order, but Harroun Commission Company knew nothing at the time purchase was made as to whom or where the corn was to be shipped after it left Texarkana.

I have attached to this deposition a true copy of a letter written by myself to Hon. Allison Mayfield, under date of February 7th, 1902: the facts therein stated are true with the exception that we state in that letter that on January 2nd we rendered invoices to Saylor & Burnett and that that was the earliest date we knew what cars we were to receive, whereas, the fact is, we knew on December 31st, what cars were to be delivered to us at Texarkana, Texas, to fill their order.

The method of buying and selling grain in any market, so far as I know, f. o. b. cars at a given point has always been in vogue since I had any connection or any knowledge of the grain business, and it was nothing new for ourselves and for many other firms to buy corn and other grain f. o. b. at any point where they could secure best prices and most favorable location for shipment to the point of ultimate destination, and has always been resorted to when any advantage could be gained by so doing. When we purchased the grain from the Harroun Commission Company f. o. b. Texarkana, we well

knew what the commissioner's rate was from Texarkana, Texas, to Goldthwaite, I cannot tell you what the Harroun Commission Company knew: they had no interest in knowing anything beyond the fact that they were to deliver the corn to us at Texarkana, as their whole interest and title to the corn ceased when it was delivered to us at that point. As has been stated, perhaps twenty times in these interrogatories, our purpose for having the grain delivered to us at Texarkana, Texas, was that we might bill it to Goldthwaite, Texas, based on the rate prescribed by the railroad commission of Texas.

It is not a fact that we ever consulted with any attorney about our method of handling or billing shipments of grain.

As to the origin of the grain, we cannot give it to you, as corn coming into Kansas City, especially that which goes into the elevators, loses its identity and when reshipped out to a point, like Texarkana, for instance, not even the operators of the elevators
33 themselves know where the corn originated. So far as my knowledge goes, the corn was shipped from Kansas City to Texarkana, but I do not know anything about what rate was actually charged on the corn up to that point, as we had nothing to do with that part of the shipment,—it only coming into our possession and under our control after it had been delivered to us at Texarkana, Texas.

We have no office in Texarkana, nor do we transact any business there except to have shipments that may be delivered to us at that point shipped to whatever destination they may be going. As has been stated frequently heretofore, the combination through Texarkana for Texas points, especially to group-3-points Texas, is not lower than can be obtained by making shipments direct from Kansas City to those points; in fact, the combination via Texarkana to such points is one and a half cents per hundred higher than the minimum balance of a through rate, from favorable territory from Kansas City to group-3 points Texas.

The bills of lading covering these shipments from Texarkana, Texas, to Goldthwaite, Texas, were made out in our office at Kansas City and we presume were made out with rubber stamps reading Samuel Hardin Grain Company, and with another rubber stamp reading "Shipper's order, notify," as that is our usual custom of making out such bills. The bills of lading covering these two shipments were made out as soon after we had learned what corn was to be delivered to us, the car numbers and initials etc., as was convenient for us to do so, and same were delivered to the Harroun Commission Company to be executed by their agent at Texarkana for our account, as it was necessary for the Harroun Commission Company to be in possession of these bills of lading until such time as we had settlement with them for the corn. In the grain business, which is strictly cash, no grain is delivered from one firm to another, except in rare instances, without receiving in turn a check in full payment for the grain, and this was the basis on which this transaction was handled.

From the moment I bought the corn, I knew that whatever corn was delivered to me at Texarkana would be shipped from there to Goldthwaite, Texas, to fill the order of Saylor & Burnett, and
34 I knew as soon as informed by the Harroun Commission Company that they intended to give us two certain cars of corn to fill their contract of December 24th, to us, that it was ultimately going to Saylor & Burnett at Goldthwaite, Texas.

The 20th interrogatory to the witness was.

Is it not a fact that on January 2nd, you rendered Saylor & Burnett an invoice on the car of grain involved in this suit as follows:

"KANSAS CITY, Mo., Jan. 2nd, 1902.

M. Saylor & Burnett, Goldthwaite, Tex., to Samuel Hardin Grain Co., Dr.

Grain, Hay, and Mill Stuffs.

Telephone 1764. Room 200, Board of Trade.

3845 P. G. 66377, 118517 bu. 2 mx. corn @ 86½.....	1025.30
Less freight Texarkana to Goldthwaite.....	82.50
	942.80

Freight prepaid to Texarkana, Tex.
Corrected invoice."

What do you mean by "Corrected invoice"? Is not the date of said invoice the true date on which the invoice was rendered to Saylor & Burnett for the said corn? Where was the corn at that date? Is it not a fact that it had not then reached Texarkana.

To which the witness answered:—

On January 2nd, we rendered Saylor & Burnett invoice on car 3845 P. & G. substantially as given in interrogatory No. 20 and marked same "Corrected invoice." By "Corrected invoice" we simply mean that on December 31st, when we first received notice from the Harroun Commission Company that two certain cars of corn had been loaded for us to fill their sale to us of December 24th, we rendered Saylor & Burnett invoices on that date, but made an error in those invoices, which we discovered on January 2nd, and then issued our corrected invoices. I presume the corn was in transit between Kansas City and Texarkana at the time the above invoice was rendered.

I note that in my letter of December 24th to Saylor & Bur-
35 nett of Goldthwaite, Texas, I made the statement that we had ordered cars for the loading of this corn. This statement was not correct, as under the nature of our contract for this corn we had not and could not order cars for same.

Cross examination:

When we bought the corn from Harroun Commission Company on December 24th, I did not know whether the Harroun Commission Company had the corn which they intended to deliver us at Texarkana, Texas, and did not know where they intended to get it, or whether it was to be shipped to Texarkana from some other point, or whether they had the corn in transit or at Texarkana. I simply bought the corn from them at given prices to be delivered to us at Texarkana, Texas.

The Harroun Commission Company did not know what we intended to do with the corn bought of them on December 24th, f. o. b. Texarkana. They had no means of knowing and no interest in knowing whether we intended to deliver it to some one in Texarkana or to go — some point in Louisiana or Arkansas, or Texas.

There was no sort of understanding between us and the Harroun Company as to what was to be done with the corn when it was delivered to us at Texarkana. Their only interest after such delivery was to receive payment for the corn.

The corn was actually delivered to us and became our property on January 14th, when they surrendered us the bills of lading covering the corn from Texarkana, Texas, to Goldthwaite, Texas, which they had had executed for our account at Texarkana, Texas. We paid for the corn by check which check we here to attach. We did not pay any part of the charges for the transportation of the corn up to Texarkana.

We had nothing to do with the shipment for the corn from Kansas City up to Texarkana, Texas, or from any point back of Kansas City. While it was known to us at as early as December 31st what cars of corn we were to receive, we had no connection with them until after they were delivered to us on January 14th, at Texarkana, Texas.

36 The rate on corn, car loads, from Kansas City to Goldthwaite, Texas, via the A. T. & S. F. and G. C. & S. F. railways during the months of December and January last was 25 cents per hundred pounds, as given in their tariff, Santa Fe system circular No. 2002–A, showing minimum proportions on grain, grain products, seeds and hay, car loads, from Kansas City and other Missouri River points to points in Texas on shipments given transit privileges. Issued November 13, 1901, effective November 10th, 1901. This rate could be obtained by rebilling the corn out of Kansas City via the A. T. & S. F. to Goldthwaite, by attaching to such rebilling shipments a back expense bill showing that the corn originated in certain territory, but 25 cents per hundred was the actual rate that would accrue to the A. T. & S. F. and G. C. & S. F. Ry. Cos. between Kansas City, Mo., and Goldthwaite Texas. The rate from Kansas City Missouri to Texarkana, Texas, via the P. & G. railway during the month of December and January was and is yet 14 cents per hundred pounds, and the rate

from Texarkana, Texas, to Goldthwaite, Texas, by the most available routes, was 12½ cents per hundred pounds, as prescribed by the railway commission of Texas.

A shipment of corn from Kansas City to Goldthwaite, Texas, via the Santa Fe during the months of December and January last would have been 25 cents per hundred pounds, when proper back-billing was attached, and that a shipment of corn from Kansas City, Mo., to Texarkana, Texas, and then billed from Texarkana, Texas to Goldthwaite, Texas, would have been 26½ cents, made up 14 cents from Kansas City to Texarkana, and 12½ cents from Texarkana to Goldthwaite, and I was perfectly familiar with these facts when these shipments in question was made.

Plaintiff offered in evidence check of Samuel Hardin on the American national bank dated January 14, 1902, payable to Harroun Commission Company, for $1779.64.

Defendant offered in evidence the letter of the Samuel Hardin Grain Company to L. L. Shields, date of October 23rd, 1901, the substance of which is set forth in the testimony above.

Defendant offered in evidence the letter from Harroun Com. Co. to Samuel Hardin Grain Co., dated Kansas City, Dec. 26th, as follows:

37 "We confirm sale to you on 24th inst. of two 66,000 pound car- of bulf # 2 mixed corn at 75½c. per bus., delivered at Texarkana our weights and grades shipment as quickly as we can get cars, cars to be held at our elevator for sacking."

Defendant also offered in evidence the letter from Samuel Hardin Grain Co. to Saylor & Burnett, dated Dec. 24th, 1901, as follows:

"We received your message late yesterday as follows: "Ship cars No. 2 sacked corn 86½ delivered here," and we hereby confirm sale to you No. 2 sacked corn f. o. b. Goldthwaite.

We have ordered the cars for this corn and it will go forward just as soon as the R. R. Co. can furnish the cars.

Thanking you for the order and awaiting further favors, we remain."

Letter from Hardin Grain Co. to Saylor & Burnett.

Also letter from Samuel Hardin Grain Co. to Saylor & Burnett of Goldthwaite, dated Dec. 31st, 1901, as follows:

"We herewith hand you invoice on your two cars of corn which we sent forward from Kansas City to-day via Texarkana and will reach you in due course of transportation.

We are mailing you our card prices to-day and if there is anything you can use, kindly wire us on receipt of same."

Also letter from Samuel Hardin Grain Co. to Saylor & Burnett, dated Dec. 23rd, 1901, as follows:

"We have your letter of the 20th stating that if we can ship you two cars No. 2 mixed corn at 88 cents that we may ship at once. We are wiring you naming you a close price of 86½ cts., which is the lowest price we can make to-day.

Trusting that this price is low enough to secure your order, we remain."

Letter Hardin Grain Co. to Alison Mayfield.

Also a letter from the Samuel Hardin Grain Co. to Alison Mayfield, railway commissioner of Texas, dated Feb. 7th, 1902, as follows:

"We are in receipt of your esteemed favor of the 5th inst. relating to extortion on two cars of corn shipped by us from Texarkana, Texas, to Saylor & Burnett, of Goldthwaite, Texas, and we
38 have carefully noted all you say. In order that you may more thoroughly understand the nature of this transaction, we will relate it from start to finish.

On Dec. 23rd, we quoted sacked corn No. 2 f. o. b. Goldthwaite, Texas, at 86½c. per bu. on that same date Mess. Saylor & Burnett, wired us, accepting for two cars No. 2 sacked corn at the above price and we also entered their order.

On Dec. 24th we bought two cars of corn from the Harroun Commission Company of this city at 75½ cents per bu., delivered Texarkana, Texas. At the time of purchase of course we had no conception of any particular corn that they were to give us, the corn not coming into our possession until it was delivered at Texarkana, Texas.

On December 31st they rendered us the attached invoice as a memorandum of the two cars that they intended to deliver us at Texarkana, Texas.

On January 14th they delivered us the bills of lading covering these two cars, from Texarkana, Texas, to Goldthwaite, Texas, and we issued them at that time the inclosed check for the amount that corn came to. On the same date we made our draft with bills of lading attached, on Saylor & Burnett of Goldthwaite, Texas.

We also enclose herewith copies of our invoices to Saylor and Burnett, which were mailed to them on January 2nd, the earliest date that we knew what cars we were to receive, which we presume is all the information you care to have on this point.

At the date of the sale we of course did not know from whom we would purchase this corn, nor what corn would be used to fill the sale, as is usual in such instances. The date of our check, of course represents the date that we came into ownership of the corn, at which time it was inroute from Texarkana, Texas, to Goldthwaite, Texas.

The writer's name appears in the left hand margin of this letter head, and would be glad to give his deposition at any time that he might be called on to do so.

As suggested in our letter, we will allow our claim for over charge to rest for the present until we learn through you what stand the G. C. & S. F. propose to take against the State of Texas.
39 If there is any other information that you desire at any time, we shall be only too glad to give it.

Thanking you for your attention in this matter, we remain."

Second Deposition of Samuel Hardin.

Defendant offered in evidence a second deposition of Samuel Hardin, as follows:

The first interrogatory to the witness was:

In the deposition already given by you in this case, you say in answer to the 8th interrogatory: "Our object in buying the corn at Texarkana was for the purpose of expediting the shipment and the delivery of the corn." In answer to the 9th Int. you say: "We desired to have these cars delivered to us at Texarkana because we thought at that time of the purchase that we could get hold of the corn there at an earlier — and consequently make an earlier delivery at Goldthwaite, than we could by waiting to buy the corn at Kansas City for direct shipment to Goldthwaite."

Now, Mr. Hardin, is it not a fact that in their letter to you of December 26, attached to your depositions, that the Harroun Commission Company stated that they had sold you two cars of corn "delivered at Texarkana, shipment as quickly as we can get cars. Cars to be held at our elevator for sacking"? Now, is it not a fact that the Harroun Commission Co.'s letter of Dec. 26th, correctly stated the terms of the trade made between you and that company? If not, why did you allow the Harroun Commission Co. to modify or change the trade? Are you in the habit of making a trade with a concern and then allow them to change it to suit themselves? Now, please refer to that letter, and refreshing your memory from the same, is it not a fact that when you bought the corn from the Harroun Commission Company, that you knew it was to be sacked and loaded on the cars at Kansas City?

Now, in answer to the first cross interrogatory in your deposition you say: "When we bought the corn from the Harroun Com. Co. on Dec. 24th, I did not know whether the Harroun Com. Co. had the corn which they intended to deliver to us to Texarkana, and did not know where they intended to get it, or whether it was to be shipped to Texarkana from some other point, or whether
40 they had the corn in transit to or at Texarkana. We simply bought the corn from them at the market price to be delivered to us at Texarkana."

Now, if you were interested in expediting the movement of the corn, how does it happen that you found out nothing from the Harroun Commission Company as to where the corn was or how soon it could be shipped? If it was already at Texarkana, is it not true that it should have made a more rapid trip to Goldthwaite than if it had to be shipped from Kansas City? If prompt deliver- was on your mind, why did you not find out something about these things? Is it not a fact that you made no inquiries as to where the corn was, because the question of expediting the shipment was not the material fact in your mind?

To which questions the witness answered:—

My recollection is that the confirmation of the trade between ourselves and the Harroun Commission Company stated the terms of our purchase covering the two cars of corn in question. That letter of confirmation from the Harroun Commission Company is attached to the original deposition and is not now in our possession, and I do not recall its exact language. If we allowed the Harroun Commission Co. to change or modify their original terms of the purchase, we did so because it was our privilege, with their consent. We are in the habit of allowing confirmations to be changed, with our consent at any time, whether written or verbal. This letter of confirmation is not in our possession, but as we recollect, at the time of this purchase verbally there was no understanding as to where the corn was to be shipped from, or as to where the cars were to be loaded; in other words, it was a matter of perfect indifference to us, so long as the corn was to be delivered to us at Texarkana at the purchase price and as quickly as possible, and at the time of purchase I did not know that the corn would be loaded and sacked at Kansas City, as the Harroun Commission Company sometimes loaded corn for us at St. Joseph, Missouri; at other times, at Kansas City, and at still others, the corn was at Texarkana at the time of purchase.

41 I do not remember all the minutiæ that passed between ourselves and the Harroun Commission Company relative to the shipment of this corn, and cannot state why we did not do this or that relative to ascertaining just where the corn was to come from or where it was at the time of purchase. Expediting shipments is always a material fact in the order trade, and the Harroun Commission Company, being large handlers of corn, were usually in a position to make prompt delivery of purchases of grain from them. We insist that this purchase was not made f. o. b. Texarkana because by doing so we could obtain a cheaper rate to Goldthwaite than by making shipments direct from Kansas City to that point, as the freight actually paid by the Harroun Commission Company to Texarkana and by us from Texarkana to Goldthwaite will verify, I think.

Anybody knows that if the corn had been already at Texarkana at the time of purchase or the earlier it was delivered to us at that point the quicker, in all probability, it would have reached Goldthwaite. I don't remember that I made any inquiries at the time of purchase as to where the corn was at that time.

Continuing the witness testified:—

Relative to the L. L. Shields shipment about which I wrote Oct. 23rd, 1901, will state that when we wrote Mr. Shields we knew that the shipment would be made from Kansas City via Texarkana and at that time a ten cent rate on corn from Kansas City to Texarkana prevailed, in consequence of which the Kansas City-Texarkana lines were overcrowded with business and were very slow in transporting stuff from Kansas City to Texarkana on account of the great volume of business that was moving that way. On November 10th as my

memory serves me, the rate on corn from Kansas City to Texarkana was advanced from ten cents to 14 cents per hundred, which of course lessened the number of grain shipments that were sent to Texas via the Texarkana gateway, and for this reason a statement that was true in October relative to prompt movement of business via the Kansas City-Texarkana lines would not be true in December and was not true in December. While we do not see that the Shields transaction has any specific bearing on the shipment in question, we do not mind stating that the statements in our letter to Shields were true and correct at the time made.

42 In our letter of February 3, 1902, to Mr. P. H. Goodwyn, G. F. A., G. C. & S. F. Ry. Co. we stated: "You seem to take the position and treat this as interstate shipment, in which you are *and* in the opinion of our attorneys in error; that was a bluff on our part, and we had in reality consulted no attorney relative to the shipment.

Under our terms of purchase of this corn from the Harroun Commission Company we surrendered our control of the billing between Kansas City and Texarkana to them, and one of the reasons for doing so was because the Harroun Commission Company sold us the corn f. o. b. Texarkana at a less price than we could have bought the corn in Kansas City and delivered it to Texarkana ourselves; and they would not have sold us the corn at Kansas City as cheaply (less freight, that we would have been compelled to pay) as they did sell it to us f. o. b. Texarkana. We of course could have bought the corn f. o. b. Kansas City and controlled the shipment all the way through, but it would have cost us more money by doing so than to have bought it delivered Texarkana; so by paying more money we could have controlled the billing, which would in our opinion be poor business.

I attach copy of our letter of November 15, 1901, to L. L. Shields, Santa Anna, Texas. as requested. After having read the letter over, we recollect of nothing contained in said letter that is not substantially true. In this letter we state: "The old basis of billing from here to Texas, and re-billing from there to Texas points has been abandoned, and we do not anticipate any more such long delays. The ninth word in above quotation should read Texarkana instead of Texas. What is meant by "the old basis being abandoned" is that the rate of 10 cents per hundred which applied on corn from Kansas City to Texarkana prior to November 10th, had been cancelled and said rate advanced to 14c. per hundred. It is not a fact that the car of corn referred to in copy of letter attached to L. L. Shields was bought f. o. b. Texarkana but was bought and paid for f. o. b. cars Kansas City.

Defendant here offered in evidence the letter to said Shields identified by the witness as follows:

We have your letter of the 13th and note what you say
43 relative to car No. 4551 P. & G. In reply will state that as we stated in our former letter, this car went forward from

Kansas City on October 18th, but was delayed in Texarkana until about November 10th or 11th when it went forward from there and it should have reached you by this time.

In making shipments to Texas, all we can do of course is to get the stuff out of Kansas City promptly and then the rest all depends on the promptness with which the R. R. Co. handles the stuff. This delay we understand was caused by a blockade at Texarkana.

The old basis of billing from here to Texas and rebilling from there to Texas points has been abandoned for the present and we do not anticipate any more such long delays.

The 17th interrogatory to said witness is as follows:

"If as indicated by your deposition formerly given in this case you were so anxious to expedite the shipment of grain to Mess. Saylor & Burnett at Goldthwaite, that you had it billed 50 or 100 miles out of the way via Texarkana to be handled by more railroads than would have otherwise handled it, if it had gone direct over the Santa Fe line, why did you not provide for and stipulate that the grain should be delivered to you at Texarkana at some specified time? Why was it that you never made any agreement or provision as to when the grain should be delivered to you? Explain these matters fully?"

To which the witness answered:

"In buying grain f. o. b. a given point it is not within the province of the buyer or the seller to guarantee that same will be delivered at any specific time, as the delivery at a given point always depends upon the promptness with which the railroad company can transport it to such point, and therefore we could not have induced the Harroun Commission Co. to guarantee any specific date of delivery at Texarkana. We have to take our chances on quick or slow delivery by the railroad company to Texarkana, the same as we would have had to take had the grain been shipped direct from Kansas City via the Santa Fe system."

The 8th interrogatory to said witness is as follows:

44 "In your deposition heretofore given in this case you testified to a rate of 25 cts. per hundred pounds from Kansas City to Goldthwaite, and you say this applied on shipments given "transit privileges"—now explain what you mean by shipments given transit privileges. What was the minimum rate on corn under the published tariff in Dec. 1900 on shipments from Kansas City to Goldthwaite; originating in Kansas City and on which no transit privileges were given, and where no re-consignment or minimum balance was involved?"

To which the witness answered:

By "minimum balance" of 25c. per 100 lbs. on corn from Kansas City to Goldthwaite, Texas, is meant that 25c. is the lowest balance of a through rate which the railroad companies will accept on corn rebilled out of Kansas City to Goldthwaite, Texas, direct and to what are known generally as "group 3 points Texas," on shipments originating north of Kansas City. We are not familiar with what

all the transit privileges given on through billed stuff via Kansas City are, but the transit privilege, as we understand it, accorded to grain at Kansas City when destined to interior Texas points, is the privilege of stopping the grain in transit at Kansas City, unloading it in an elevator, if found expedient, or desirable, and then reshipping the grain to some interior point in Texas at the balance of what would have been the through rate had the shipment been billed direct from the point of origin to some destination in interior Texas; subject to a minimum rate out of Kansas City to such Texas point, established by railroad companies granting such transit privileges. The minimum balance from Kansas City to Goldthwaite, Texas, in December, 1901, was 25 cents per hundred. To illustrate how this minimum balance applies on shipments of corn from Kansas City to interior Texas points when the corn originates at different points. The railroad companies have grouped off the State of Texas in districts, designating them "group 1, 2, 3, 4 and 5." They have also grouped off stations, in what is known as the supply territory, in Oklahoma, Kansas, Nebraska, Missouri, Iowa, portions of Minnesota and South Dakota, into territories, designating them by the letters A B C D etc. etc. We will take a shipment of corn originating at Edgar, Neb., which is in supply territory designated by the letter L. The rate on corn from Edgar, Neb., to Goldthwaite, Texas is 39c. per hundred lbs. when billed from point of origin to destination. The rate on corn from Edgar, Neb., when billed to Kansas City, is 14c. per 100 pounds. If after the corn had arrived at Kansas City it is desired to be reshipped on to Goldthwaite, Texas, the railroad companies will transport in from Kansas City to Goldthwaite, Texas, at the balance of the through rate of 39c. per 100 from point of origin to destination, or 25c. per 100 lbs.; this balance being the dif-erence between the 14c. to Kansas City and the 39c. through rate. Now, we will take a shipment of corn originating at Lincoln, Neb., which is also in territory designated by the letter L, and on which the rate to Goldthwaite, Texas, if shipped directly through would be 39c. per 100 lbs., the same as though originating at Edgar, Nebraska. The rate from Lincoln, Neb., to Kansas City, Mo., on corn is 10½ cents per 100 lbs. If a shipment of corn is billed to Lincoln, Neb., to Kansas City and then it be desired to rebill said car of corn to Goldthwaite, Texas, the railroad company taking the car of corn south from Kansas City to Goldthwaite would demand the balance of the 39c. through rate or 28½cents per 100 lbs. So it will be seen that in order to reach interior Texas points to best advantage from Kansas City on direct shipments it is necessary to secure corn originating not only in certain territories, but that pays a certain rate into Kansas City. In Kansas City the various shipments of corn are designated as shipments which carry favorable or unfavorable billing, when it is wanted for direct shipment to interior Texas points. It frequently happens that there are days and days when shipments of corn carrying favorable billing to Texas points cannot be obtained, and fre-

quently when cars can be obtained showing such favorable billing it is not of the grade or quality to fill the orders in hand, and in that way if we had to depend on securing corn carrying such favorable billing, the shipments to Texas points would frequently be indefinitely delayed. This explains in part what we meant by saying that we bought the corn in question f. o. b. Texarkana, to expedite its ultimate delivery to Goldthwaite, Texas. As to the rate
46 on corn shipments from Kansas City to Goldthwaite, originating in Kansas City, without any transit privileges, will state that that all depends on the route. The rate, as we understand it, as published by the Santa Fe system on corn billed flat out of Kansas City to Goldthwaite, was 35c. per 100 lbs., but we deem it pertinent to state in this connection that no shipments of corn were ever made or would be made on that kind of rate. The rate applying on corn in December, 1901, to Texarkana, Texas, was 14 cents per 100 lbs., and the rate from Texarkana, Texas, to Goldthwaite, was 12½ cents per 100 lbs., or 26½ cents through. We stated above that the rate on corn from Kansas City to Goldthwaite, Texas, via the Santa Fe system, when originating in Kansas City, without any back billing reference would have been according to the Santa Fe's group tariffs, 35c. That of course assumed that the corn would be grown in or around Kansas City, and that it never moved into Kansas City on the proportion of a through rate. A shipment of this kind could not and would not be made for the reason that no corn is grown in Kansas City. All of the corn in this market is shipped here from surrounding territory, and the rate above quoted would never in a thousand years be used on a shipment destined to Texas, simply because a cheaper rate applies both via the Santa Fe system on direct shipment to Texas and via other lines and the Texarkana gateway.

M. S. Bird.

Defendants offered in evidence the deposition of M. S. Bird, as follows:—

Occupation, grain dealer, with the Harroun Commission Company; in their employ as cash salesman.

The letter shown me signed Harroun Commission Company dated December 26th, 1901, is correct.

We sold the Samuel Hardin Grain Company the said two cars of corn on the 24th day of December, 1901, but didn't confirm it until the 26th. I didn't know to whom the cars were going. I knew that they were to go beyond Texarkana, but our sale was basis of that point, Texarkana. As our sales was basis delivered Texarkana, I, for myself, know nothing of any further shipping direc-
tions than to that point. The sale of itself gave shipping
47 directions and of course were given when the sale was completed. As for my part, I knew nothing of any directions to re-consign said two cars from Texarkana via the Texas & Pacific

railroad to Saylor & Burnett at Goldthwaite, Texas, as I have nothing to do with that part of the business. I gave our office force directions to carry our any billing that he might request, but do not know what directions were given. The only shipping directions so far as I am aware of were those which directed the cars to Texarkana, which were given on December 26th, the date the trade closed. Those directions were merely in the form of confirmation of the sale. The Harroun Commission Company had an agent, F. L. Atkins at Texarkana for the purpose of finding out when cars arrived there over Kansas City Southern and other railroads, and without unloading them getting bills of lading over T. & P. and other railroads to points in Texas. This was the purpose for which we had Mr. Atkins stationed at Texarkana. He never had any office at Texarkana and only stayed there when grain was moving actively. Mr. Atkins' presence at Texarkana did not enable us to quote more advantageous prices f. o. b. cars at Texarkana to grain buyers except to prospective buyers at Texarkana, to whom he would quote our prices and thereby save the trouble and expense of conducting telegraphic communications with each individual buyer. We knew nothing of the rates between Kansas City and Texarkana; we bought it outside of Kansas City bases delivered at Texarkana, and made our quotation to Samuel Hardin Grain Co. on the same basis. The grain having been billed through from country points to Texarkana, with simply a stop-out privilege, for sacking and transfer privileges at Kansas City.

We didn't pay the freight at all. The freight was prepaid by parties from whom we bought it. The number of the cars were 3845 and 4189 P. & G. We had no expense bills at all, our purchase being made on basis of Texarkana, the parties from whom we bought paid the freight and made delivery to us at Texarkana. Having this grain bought basis delivered at Texarkana we knew nothing of what rate of freight was paid from originating point or from Kansas City. No sir we have had no reduction or rebates made us. We shipped the corn to Texarkana because we
48 could buy it from outside parties delivered Texarkana more advantageously. The cars were simply transferred at Kansas City and our having it purchased basis delivered Texarkana it was not necessary for us to ask Santa Fe Railroad Company for a rate out of Kansas City to Goldthwaite. I do not know what rate we could have gotten from Kansas City to Goldthwaite over the Santa Fe railway. At the time the sale was made I did not know what point from Texarkana this grain was to go and have never looked the commission's rate from Texarkana to Goldthwaite.

There was no market for corn on the 24th day of December in Kansas City but on the 26th, the day this sale to Hardin Grain Company was confirmed, the market was 67¼ to 68c. for No. 2 corn. It is not a fact that we arrived at the price of grain f. o. b. Texarkana by taking the prices of corn in Kansas City and adding it to the rate per bushel on the grain to Texarkana at the local rate be-

tween Kansas City and Texarkana. We could not sell Samuel Hardin Grain Co. this grain f. o. b. Kansas City, as we did not have it purchased this way. We had grain which we could have sold him here at the market prices as quoted above. We quoted them the grain f. o. b. Texarkana because we had our purchase made in this way and knew nothing of what disposition Samuel Hardin Grain Company would make of the corn. And do not know whether it was to their interest to buy it delivered Texarkana in order to get the commission's rate out of that point or not.

The letter of December 26th 1901, from Harroun Commission Co. to Hardin Grain Co. correctly states the facts and terms of the trade as to the two cars of corn as verbally made with the Hardin Co. It is a fact that the freight was prepaid on those two cars of grain. It is not an unusual proceeding. In making shipments out of Kansas City elevators, we usually prepay freight.

In regard to the statement of Samuel Hardin in his deposition in reference to shipment made to L. L. Shields by them at Santa Anna, Texas, about October 23, 1901, I am under the impression that there was an open rate of 10c. per hundred between Kansas City and Texarkana on corn in effect at this time. Not having bought
49 this grain which we sold Samuel Hardin, is of Kansas City, but basis of Texarkana, I do not know what rate obtained between Kansas City and that point on that particular shipment.

Cross examination:

We did not know where Samuel Hardin was shipping his grain and having sold it to them basis delivered Texarkana we know of no reason why he could not have sold it in Texarkana if he had desired to do so, and it would not have made any difference whatever to us.

There was no reason why the Samuel Hardin Grain Co., as far as we were concerned, could not have shipped this to points in Louisiana, Arkansas or elsewhere and disposed of it and it would not have made any difference to us.

The corn became the property of Samuel Hardid Grain Co. when we made our delivery to him at Texarkana and was paid for by them when the delivery was made.

No, there was no understanding between myself and the Samuel Hardin Grain Company as to where this grain was to be shipped from Texarkana, nor were we interested in the grain further than making a delivery of it to the Samuel Hardin Grain Co. at Texarkana, and we received our money in payment therefor.

Miss Edna Harroun.

Miss Edna Harroun, testified by deposition, offered in evidence by the defendant:—

Age 27 years; residence Kansas City, Mo. occupation book-keeper. I am secretary of the Harroun Commission Company. The com-

pany is a corporation. A. L. Harroun, president, W. H. Harroun, vice-president; Edna Harroun secretary.

Mr. F. L. Atkins acted as our agent at Texarkana. He was there to do whatever we told him to do or to sell grain for us. I cannot recall that he ever paid freight on shipments to Texarkana. He did re-bill shipments for us out of Texarkana over the Texas & Pacific and other railroads. That was partially the reason we had Mr. Atkins stationed at Texarkana. I do not know whether
50 he had an office at Texarkana or not. I think he stayed there just when the grain was moving. I do not know whether Mr. Atkins was stationed at Texarkana for the purpose of enabling us to quote more advantageous prices on corn f. o. b. cars at Texarkana or not. I know nothing about the quotations. We paid no freight on the two cars of grain referred to. We bought the corn f. o. b. Texarkana. It is my understanding that the corn was merely transferred at Kansas City. As we bought it delivered Texarkana I know nothing about the rate of 25c. per 100 lbs. over the A. T. & S. F. I know nothing about the Texas commission rate.

Cross examination:

I knew nothing about the disposition the Samuel Hardin Grain Co. intended to make of the grain. There was no reason that I know of why they should not sell it in Texarkana, if they had desired. I know of no difference it would have made to us.

I know of no reason why the Samuel Hardin Grain Company could not have shipped the corn anywhere they desired. It would have made no difference to us. The corn became the property of the Hardin Grain Co. as soon as they paid for it. The corn was paid for by check given by Samuel Hardin dated Jan. 14th, 1902, for $1779.64. I do not know of any understanding between the Samuel Hardin Grain Company and Harroun Commission Company that the corn was to be shipped beyond Texarkana. We had no interest in the corn after it was delivered to Samuel Hardin and paid for.

A. L. HARROUN.

A. L. HARROUN, by deposition offered in evidence by defendant, testified:

I am president of the Harroun Commission Company. We sold Samuel Hardin Grain Co. the said two cars on the 24th, that is, the sale was confirmed on the 26th day of December, 1901. The corn was sold by Mr. S. M. Bird and I do not know the final distination of the corn. I do not know anything about the trade. The only shipping directions we had were to deliver the corn to Samuel Hardin Grain Company at Texarkana. The directions were given on the 24th dayof December, 1901. I do not know anything about
51 any directions to re-consign the cars to Goldthwaite, Texas, I have no personal recollections nor do our books show that

any directions were given to any one at Texarkana or elsewhere to carry out any shipping directions of Samuel Hardin Grain Company after the grain reached Texarkana. The only shipping directions given by Samuel Hardin Grain Company were to deliver the grain at Texarkana, and our confirmation of their purchase, by letter of December 26th, 1902, correctly states the terms of sale. We had a- agent at Texarkana, whose name is F. L. Atkins. He was down there as our agent to sell grain products and do anything he was called upon to do. I do not know what his particular duties were, nor whether he rebilled grain at Texarkana or not. I look after the financial part of the business and am not here all the time. The buying and selling of cash grain is done by Mr. S. M. Bird. I do not think Mr. Atkins had an office in Texarkana and his employment was not regular. Texarkana uses a great deal of corn and by having Mr. Atkins there to meet these people in person he could get the quotations out quicker from there than we could from here. That was the main advantage of having him there. He was there to look after our business in general. I do not know anything about the advantage in shipping to Texarkana and from there to Texas points under the Texas commission rates. We paid no freight as we bought it delivered Texarkana. There was no market on the 24th, but on the 26th the price was 67½ and 68. The price was not arrived at by adding the freight from Kansas City, because this grain was bought delivered Texarkana and sold the same way. We could not have sold this corn f. o. b. Kansas City because it was bought f. o. b. Texarkana and had to be sold the same way. I do not know whether it was to the interest of the Hardin Grain Company or not to have the corn delivered at Texarkana. We did not prepay the freight on this grain. It is not an unusual proceeding to buy freight delivered, with freight prepaid, sometimes freight is prepaid and sometimes the freight follows.

Cross examination:

I know of no reason why the Hardin Co. should not have sold this corn in the city of Texarkana if they had desired to do so. It
52 would have made — me or my company if they had done so. It would have made no difference to *no difference to* us where they sold the corn. It was their corn when they paid for it. It was delivered to the Samuel Hardin Grain Co. at Texarkana and paid for in Kansas City. There was no understanding between us and the Hardin Grain Company that I know of that the corn was to be shipped beyond Texarkana. We had nothing to do with the corn and no interest whatever in it after it was delivered to Samuel Hardin Grain Co.

L. W. McBride.

L. W. McBride, for the defendant, testified:

"That he was agent for the Texarkana and Ft. Smith Ry. Co. and that his occupation in Jan. 1902 was the same. That P. & G. car 3845 loaded with grain was received by the Texarkana & Fort Smith Ry. at Texarkana on Jan. 7th and was delivered to F. L. Atkins, authorized agent of the Harroun Commission Co. He came to the office, surrendered the bill of lading, receipted us for the car and requested us to set it over on the T. & P. transfer track. This constituted a delivery to Atkins. The car was not unloaded while in our possession, as Mr. Atkins place of business was not on our track. The car was transferred under the original seals. I do not know whether Mr. Atkins ever saw the car or not. It arrived January 7th and was transferred to the T. & P. on the 12th.

P. H. Goodwyn.

P. H. Goodwyn, for the defendant, testified:

Am general freight agent for the Santa Fe; have been for seven years; been in the railroad service for the same line nine years in all. Have been in the freight department twenty-odd years.

The minimum through rate which the shipment in question in this case could have gotten from Hudson South Dakota to Goldthwaite Texas, was 46 cents per 100 lbs. Hudson is not in a territory that has established through rates; the railroads interested have divided the supply territory into various groups, limiting themselves however, to those groups which ordinarily ship grain to Texas; Hudson, South Dakota, is beyond the limit of any group so defined; the nearest group to it is what we call Fox river
53 territory, Hudson being a few miles outside of that. The rate from Fox River territory to Goldthwaite was at that time 46 cents per hundred pounds, which was necessarily the minimum rate that could be applied from a point beyond the Fox River territory. The rate might have been more but could not have been less. It may have been more just to the extent of what it would cost to get the shipment into the Fox River territory. That 46 cents was the minimum possible through rate under any circumstances. A shipment moving from Hudson into Kansas City could not get a minimum balance rate out of Kansas City of 25 cents; it was not in such territory, that moving into Kansas City it could get that rate.

I directed the making of the charge made on this shipment in person. In so doing I acted under legal advise of Mr. Terry the road's solicitor. I did not inforce the rate of freight provided by the railroad commission (of Texas) for a shipment from Texarkana to Goldthwaite as per the bills of lading issued, because according to the best information I could get, the shipment did not originate at Texarkana, but that it came from or through Kansas City. That

it was in fact an interstate shipment was the motive or reason for the action taken. As an officer of the railroad, it is my duty and effort to comply with the interstate commerce law, and its provisions as well as the State law. In connection with the T. & P. Railway Company there was issued a through tariffs on shipments of this character from Kansas City to Goldthwaite and in force at the time this shipment moved. That tariff was filed by the Interstate Commerce Commission. A great number of roads were party to it, twenty or thirty, all the roads involved in handling grain in this territory and in the territory in which this shipment moved; including the Texas & Pacific Railway Co. the Kansas City Southern, the Texarkana & Ft. Smith Ry. Co., the G. C. & S. F. Ry. Co. At the time this shipment moved the Santa Fe had an agreement with the T. & P. for divisions of the through rate. As to the basis of that division, the Santa Fe was to receive on shipments of grain from Kansas City coming to it from the T. & P. Railway Company and destined to Goldthwaite sixty four per cent. of the through rate; sixty four per
54 cent. for the haul from Fort Worth to Goldthwaite. The balance of the charge would go to the T. & P. and its connections. The through rate from Kansas City to Goldthwaite via Texarkana as established by the tariff was 35 cents per 100 lbs. The Santa Fe was allowed so large a proportion as the result of the operation of a mutual agreement contemplating on the one hand the handling business from the T. & P. to the Santa Fe, and so on the other hand from the Santa Fe to the T. & P. from and to what we call our local territory, stations and points not reached by any other road; each of us respectively demanded from the other what might seem a very liberal extra-large proportion of the rate; the T. & P. for example desired that the bulk of the business for this local territory should reach them over their associate lines, and failing to receive it from such lines, that they should earn on what came to them from other lines a very large division.—By associated lines I mean other lines of the Gould system, lines that favored them with practically all their southbound Texas business. We, similarly, desired that our business should reach us through our system lines which favored us with all their Texas business, and if we received a like character of business, from other connections, we wanted the other connections to pay us for it. This disproportion in the division of the through rate was because we favored the line that favored us. That is a universal policy among railroads all over the United States; everybody understands that; there is no concealment about it at all. Each line fosters its own traffic, and makes a more liberal division with those connections that give it the most business and most favor as to whether a shipment of grain would be expedited or moved more promptly coming from Kansas City, through Texarkana to Goldthwaite than it would over the Atchison Topaka and Santa Fe and Gulf Colorado & Santa Fe, the result naturally and almost inevitably must have been almost exactly the contrary: in the movement of a car load of grain, for example,

from Kansas City to Goldthwaite over our immediate connections, our preferred connections especially, viz: the Atchison, Topeka & Santa Fe, there is no transfer of the contents en route; there is a connecting train schedule arranged from the initial point to destination, under which schedule the cars usually move, insuring the delivery at the destination with the least possible delay. On the other hand, in movement through Texarkana there is a total absence of any such connecting schedule to begin with—the lines are not run with a view to making connections with trains on the connecting lines at all—and there is the unavoidable delay incident to the rebilling of the car at Texarkana—it may have been originally consigned there locally—upon its arrival at Texarkana, the party intending to rebill it there will have to be notified, he would surrender the original bill of lading, pay the freight on it, unless it was prepaid, give his instructions for rebilling, all of which necessarily consume a length of time, and in this particular instance, I believe, consumed six or seven days; and in the course of its further transportation from Texarkana to Goldthwaite over the T. & P. railway, there is the same liability to detention at Fort Worth—it is not exactly the same, but in the transfer of the car from the T. & P. to the Santa Fe, there is a loss of time which does not occur in the case of a through shipment. The shorter distance also by the Atchison Topeka & Santa Fe, and the Gulf Colorado & Santa Fe. As a matter of fact, my experience with those shipments coming through Texarkana is, that they have been almost invariably delayed. Almost every shipment that has been called to my attention has been much longer on the road than a direct shipment would have been. In the line of my experience and knowledge of such matters, there was no reason to suppose that the shipment in question could have been forwarded more expeditiously by going by Texarkana. The Santa Fe railroad had joint tariffs with the T. & P., and agreements for through rates on grain from Kansas City to Goldthwaite, applying on such a shipment as that involved in this case, and if as a matter of fact, this was an interstate shipment, there were agreements and arrangements made with the T. & P. to cover that kind of a shipment Kansas City to Goldthwaite, and they were in force and effect at that time. The rate over the Atchison Topeka & Santa Fe and the Gulf Colorado & Santa Fe from Kansas City to Goldthwaite was 35 cents, the same as by any other road.

Cross examination:

If my road offered to give the T. & P. of the $165 that they collected for the shipment of this car from Texarkana to Goldthwaite *was*, I presume, it was in the ordinary course of the interchange. It is not a fact that before the instructions were given to make this charge on the shipment, that I had been advised that the railroad commission had passed on this particular matter, or that I had been

notified that my line was only entitled to charge 12½ cents; that did not happen before the charge was made. I think at one time, I was advised by the Samuel Hardin Grain Company that they had consulted the commission; it is my recollection that I got a telegram from them stating that fact before the collection of the charge. It is not a fact that on this and various other matters, I and my road, are continually violating the rules and regulations and charges of the railroad commission. It is not a fact that we are continually violating the commission's rules and regulations. I take counsel's question to mean whether I or my company, or any officer of the company have set a purpose to oppose the commission in its rules; we have no such intention; have never pursued such a practice; we have differed with the commission at times; that is of course, true, which everybody knows. But we have not any persistent aim of embarrassing or harassing the commission, or of setting up our judgment in opposition to the commission, except where we think our vital rights are concerned and involved, and those occasions do not occur often.

The parties have an undoubted right to make an agreement to ship this car of corn from South Dakota to Texarkana. Witness was asked: After they shipped it through to Texarkana, and delivered it to Texarkana, was there any way at all in which it was possible for you then to have the right to say that it ought to have been unloaded and shipped on your line and the Atchison line from Kansas City to Goldthwaite, simply because it may have been intended to ship it originally to Goldthwaite, if they had wanted to? And answered, I think it is in evidence—I have seen the papers at all events—that the car did not come through to Texarkana under the bill of lading issued at Hudson, but is was forwarded to Texarkana under a new bill of lading. Witness was asked: Now, in what way could that have ever
57 effected the rights and duties and obligations of the company which were under obligation to ship the stuff from South Dakota to Texarkana—the fact that they got new bills of lading at Kansas City? And answered: If I understand your question correctly the surrender of the original Hudson bill of lading at Kansas City, the delivery over of the grain to its owners, and the taking out of a new bill of lading, the making of a new shipment from Kansas City to Texarkana abrogated or terminated the original bill of lading from Hudson. I should think it would have that effect; it is presumably a question of law. Taking it that the contract was that the grain was to be shipped from Kansas City to Texarkana 18 cents to Kansas City from South Dakota, and 14 from Kansas City to Texarkana, making 32 cents as a practical question, I should say that the companies are not under obligation to ship it from South Dakota to Texarkana for 32 cents regardless of the fact it was unloaded there. If it is a matter of any interest, I can state what is the custom in such cases: Whether a through rate was granted from Hudson to Texarkana or not, the shippers or owners of the grain had the privi-

lege of taking it into their possession at Kansas City, a terminal of the Chicago and St. Paul; its bill of lading was executed by that delivery at Kansas City—that is, its liability ceased and the owners of the grain had the right to take it into their possession at Kansas City, and could make a new shipment if they wanted to. This privilege is accorded them by the railroads at any time. There is a milling in transit rate; you can ship stuff and stop it at a certain place, with the privilege of shipping it afterwards, or shipping what is made out of it, to another place at a through rate. Witness was asked: Ain't that just exactly what was here, that they had the right to ship that stuff from South Dakota to Kansas City, and stop it there and sell it if they wanted to, or take it from that point to Texarkana, and then only pay the 14 cents from Kansas City to Texarkana? and answered: I can only presume that they did. I presume that they did; eighteen cents and fourteen cents appear to be the rates. There was no necessity for any such privilege as this shipment; it was simply the two rates. They could have shipped it originally from South Dakota to Kansas City for 18 cents
58 under a bill of lading showing Kansas City to be the destination, and then could have reshipped it to Texarkana for fourteen cents. The form of the bill of lading, as a question of practical procedure, I don't think has much bearing.

Re-direct examination:

The Santa Fe road I do not think has had any more differences with the commission than any other line operating as many miles in Texas; quite sure it has not, than any of the other important lines. The commission has never denied to the Santa Fe the right to be heard, and state its own views as to what is the law, and to what particular class of tariff the commission rates apply. We understand we have the right under the law. As far as I know we have no more controversy with the commission than any other road. The feeling between my road and the members of the commission has been right the reverse of ill will; it is our policy and has been throughout to act in harmony with the commission. It is entirely the constant effort of myself and Mr. Terry and the law department and the general manager's office to comply with the commission rulings until such time we thought they exceeded their authority, and we reserve to ourselves the right to contest it, in the vital questions of revenue. In many instances the Santa Fe has surrendered to the commission what it believed to be its legal rights rather than to get into controversy. The question of this case is one of vital importance, very; because if we have to recognise the application of the commission rates on this corn moving through Texarkana our proportion of such rates is from five to seven cents per 100 lbs. whereas, if it moves under the guise we believe it should, that of interstate commerce, as through shipments from the point where it originates, the amount earned is from 12 to 16 and 18 cents per 100

lbs., over two or three times as much in seasons of heavy movement that is as much as two or three hundred cars a month, and means a matter of eight or ten thousand dollars revenue to us, whether we have to recognize the commission rates, or don't recognize them. It is and was my view under the facts as I have known them and understood them, that this shipment was interstate commerce. When the carload of corn got to Goldthwaite, and when I ordered this rate charged, I knew it had been billed from Texarkana. As an absolute fact, I did not know that it had originated beyond Texarkana; my information was that it had. I knew and
59 understood that it had been sold by Kansas City parties for delivery at Goldthwaite, and that the date of the shipment from Texarkana was ten or fifteen days after the date of sale at Kansas City. It has been a very general practice in this State for grain merchants to concentrate grain and corn in Texas, and afterwards distribute it out under the interstate rate; that is the common practice, that they insist upon the interstate rate to final destination of the stuff after it has accumulated in Texas and been held here for a while. In case it worked out to their interest. I knew at the time I made this charge, that that was the general practice. It was not before I instructed the charge made in this case that Hardin had advised me the commission had told him the 12½ cent rate ought to apply, but, as I recollect, it was before the car was finally delivered and the freight collected that I had such advice as that from the Harding Grain Company. I have not looked at the correspondence for a long time; I knew that I had a good deal of correspondence with the Hardin Grain Company at that time; I knew that we were insisting upon the collection of 25 cents per 100 lbs., and knew they took the matter up with the railroad commission, and I am under the impression that in some manner, either telegram or writing, I knew that they had taken it up with the commission and the commission sustained their views. Whether that occurred before or after the delivery, I am not entirely clear. Refreshing my memory from the original correspondence handed me, that while the car was on hand at Goldthwaite—that they referred to the commission rate in their telegram to me. Apparently the last I had from them was this telegram of January 19th reading as follows:

"P. H. Goodwyn, Galveston, Texas:

Message today shipment corn originated Texarkana Texas, commissioners rate twelve and a half cents to Goldthwaite. Must insist that freight be assessed at that rate. If consignees cancel order by reason of this delay your company must assume all liability. Answer definitely quick.

1:55 p. m.

SAM'L HARDIN GRAIN CO."

60 To that telegram I replied: On January 19th 1902.

"Wire yesterday. Your invoices are evidence that cars did not originate at Texarkana. Device of breaking transit there by taking out new bill of lading does not effect true character of the shipment. We must still decline to protect Texas Commission rate from Texarkana."

There seems to have been nothing from the commission, nor nothing quoted as coming from the commission until January 28th. I happened to be in Austin about the 24th of January, some time during the last ten days of January, when Mr. Mayfield himself brought up the case with me. I believe, however, the car had been delivered before that time. No special hearing was had in this case. The matter was handled between me and the commissioner Mayfield in the best of good spirits, and the road practically waived a hearing, everybody understanding practically what the facts were, and after a discussion of the matter, I and Commissioner Mayfield reached a conclusion we could not agree, and it was understood that without any formalities it would be submitted to the courts; to test our legal rights. Mr. Terry and myself had a discussion with Commissioner Mayfield after the complaint had been formally filed, and we could not agree as to the rights of the company in the premises. I think there was some talk at the time with Judge Bell in which this was practically agreed to be made a test case, and selected this particular*ly* case as my memory serves me, to make a test on, and let the court determine whether it was interstate business under these circumstances. This was selected as a test case to determine the rights of the parties. It is a fact that at the time of reaching the *the* conclusion not to apply the commission rate, I was entirely familiar with the interstate commerce law, that is with the general provisions of it respecting my business, and knew that the law placed heavy penalties upon any railroad that under any kind of cover protected a lower rate than the interstate rate. I was sort of between the devil and deep sea. Twenty-five cents is the lowest rate under any circumstances for which corn out of Kansas can come into Goldthwaite, and that is the rate that I charged on this shipment. At that time I did not know where this corn came from to Kansas City. In making that charge
61 I gave the shipper the benefit of the doubt, and charged him the lowest possible rate from Kansas City.

Re-cross examination:

I spoke in direct examination of the practice of shipping corn from Oklahoma Territory, for example, or Kansas, here to Fort Worth putting into an elevator here, or into a store house, sacking, inspecting and weighing, and upon its sale to a buyer at another point in Texas, say for instance, at Grandbury—(the practice applies universally whether the buyer is on our road or not)—of granting the privilege of reconsigning to Texas points, corn which originates

outside of Texas with the protection of the through rate that applies from its point of origin to the point of final destination in Texas. I mean we will carry grain from Kansas City to Fort Worth, and there it will be put in an elevator or a storehouse, as the case may be, and then it will be allowed to be loaded on the cars of our railroad company, and shipped from here, say Temple, at a different rate from the commission rate from here to Temple. I mean to say, most certainly we are not violating the law by doing that, and I am certain that the commission had never taken any jurisdiction of the practice; I know that the commission knows of it; it is abundantly shown and plainly shown in all our tariffs; it is done every day. It is a practice on our road and all others in the State, any grain handler in Fort Worth can have the benefit of it, and a great many of them do use it. I do not recall the commission rate from here to Temple; but it is about 10 cents per hundred. Under this plan it would be about one or two cents—it would be the balance of the rate, whatever it might be, from the initial point in Kansas or Oklahoma, or the Indian Territory as between Fort Worth and Temple; take the rate from initial point to Temple, say 25 cents, and the rate to Fort Worth, say 21—then that corn would be re-hauled from Fort Worth to Temple for four cents. I know the commission knows that it has been frequently *been* referred to in our hearing before the commission. It is simply giving the Texas dealers the same privilege enjoyed by Kansas and Oklahoma Territory dealers.

62 Re-direct examination:

That practice is not confined to the Santa Fe at all. It is shown in the tariff, and it is something everybody knows about. It gets into a very deep question, when it comes to explaining the reason for that policy. It is all a part of this milling in transit traffic, and is still interstate commerce until it reaches the final destination. This milling in transit, is to enable the stuff, the primary object,—you may say is to benefit or facilitate the business of the collectors of the grain on the one hand, and the consumers on the other. Grain is harvested in a comparatively short period; and as a rule the fields where it is harvested are destitute of sufficient storage to take care of the entire production. Transit privileges started in order to provide storage points where this grain could be taken care of until due course of time a market could be found for it. It could be shipped from the fields and the storage points to the elevators at whatever the rate might be to such points, when finally sold to consumer would be re-shipped to that consumer at a point beyond, and the through rate protected from the initial point to such final destination instead of charging two rates, one into the storage point, and one out of the storage point. It was simply a transit privilege to protect the consumer and facilitate its handling by the dealer. It is a practice that prevails all over the United States; it has been discussed frequently before the commission. Certainly they under-

stand it, and those rates are allowed with the knowledge of the commission and the traffic is considered interstate traffic until it reaches the final destination of the grain.

Examined by the COURT:

Twenty-five cents is not the interstate rate from Kansas City to Goldthwaite, it is the lowest minimum balance to which a shipment of grain would be entitled. Thirty-five cents would be the rate from Kansas City, without regard to its being a shipment from somewhere else. That was not the rate I went on in this case. I collected 25 cents. I did not assess that upon the idea that the shipment had originated in South Dakota, not necessarily; I assessed it on
63 the idea that it originated at some point beyond Kansas City, as practically all the corn moving into Texas did so originate. I assessed it on the idea that the shipment was destined to Goldthwaite at the time it was begun. The handling of grain under the re-consigning privileges subject to this minimum balance is likewise provided for in the tariffs. In this tariff I have, for example, is the *the* minimum balance, and it was filed with the Interstate Commerce Commission. It states at what minimum balance we will handle grain. This tariff is filed with the commission.

Further direct examination:

I think the minimum balance is explained with sufficient clearness in Mr. Harding's deposition. The through rates are prescribed from various defined sections of the producing territory, all clearly marked out by railroad lines as a general thing. There are A. B. C. &c. producing sections. On the other hand the points of destination in Texas are similarly grouped, 1, 2, 3, &c. Rates are fixed from each one of these producing sections to each one of these consuming sections. In a great majority of cases there is little direct shipment from the producing point to the point of final destination. It is nearly all handled on this re-consigning basis. We will say that from a given producing point to Goldthwaite, the rate is 35. From that same producing point to Kansas City the rate is 8 cents. Upon its re-shipment, after going through the Kansas City elevator, upon its re-shipment to Goldthwaite, the charge to Goldthwaite would be 27 cents, the through rate from the point of origin less the amount paid in to Kansas City. On the other hand, if not originating in a group, where the rate was 11 cents into Kansas City, the rate from Kansas City to Goldthwaite, would be 25 cents, or with the 11 cents into Kansas City one cent higher than the through rate. These parties could not have shipped this particular corn in this case through on that 25 cent minimum balance rate, because the through rate from the point where it originated was 46 cents, and they paid 18 cents into Kansas City, so the least it could have come out of Kansas City for was 28 cents. In this case I did not know at the time

where it originated, and collected the least which could have been charged collected from the most favorable point. Had there
64 ever been any general practice of handling grain as interstate grain through Texarkana for Texas points, the railroad would have undoubtedly fixed certain minimum balances from Texarkana. But until this last season there has never been any movement of grain through Texarkana to amount to anything and it was only done this last season to get the use of the Texas Commission rates applied from there. The routing taken in this case was to get the benefit of the commission rate.

We have no regular tariff providing for minimum balance on shipments originating beyond Texarkana and destined to Texas. I will say that we are perfectly willing for a 25 cent rate to be applied as a minimum balance on interstate shipments of grain, because then we get our interstate division but we are not willing to accept a division of the Texas rate. On this 25 cents we collected we paid no portion to the Kansas City Southern. We kept 25 cents less 6¼ cents—kept 18¾ cents per hundred pounds. That would have been less than our prorate from Kansas City to Goldthwaite, via the T. & P.; 22 cents would have been our portion, 64 per cent. of 35 cents.

Re-direct examination:

I do not know whether we tendered the T. & P. a settlement of 50 per cent. of the $165; I have nothing to do with the adjustment of the accounts in the auditing department. The reports I have seen to connecting lines of freight collected show the whole amount collected. The T. & P. knowing that $165 to be the actual collection as an interstate rate had a right to demand and could have demanded their proper portion of that $165; as it turns out—I didn't know it at that time—it turns out their proper proportion would have been less than 6¼ cents. The arrangements for the proportion to go to the Kansas City Southern, would be through the T. & P. They would make the settlement with the Kansas City Southern. There has never been a time since we have collected this money that we would not have been willing to prorate it on the proper basis. Witness was asked: And you held it because the T. & P. declined to receive it? And answered: As to that, I think the T. & P.
65 have got all they were entitled to out of it and more. At the time this grain was moving there was practically no grain being raised in Texas, or being moved in Texas to amount to anything; the crop was a total failure, practically; what little had been raised had been long since consumed. Not so far as any man ever heard of was there any being shipped out of Texarkana that was raised at Texarkana. There was a local wheat market at Texarkana, I presume. Ordinarily Texarkana is not a distributing point for wheat, or corn, or anything,

Re-cross examination:

If a shipment comes to us under through billing from Kansas City, there are two systems for settlement by different accounting departments; one is for the terminal road to report to its next connection all of the earnings accruing up to the point of junction with the terminal road; the other is to report to each individual carrier. I have not said that the other roads in this case were entitled to 36 per cent. of the $165. I said if the shipment had moved from Kansas City, had been billed from Kansas City, under the rate properly applicable from Kansas City, the other roads would have been entitled to 36 per cent. of 35 cents. Whether or not there is any way in which I can figure out that we settled with the T. & P. according to the amount that it was entitled to, except on the theory that they were entitled to one half of the commission rate, I will say that the T. & P. told us that is all they wanted. According to my understanding, the amount they took was not their proportion of the through rate: I was not claiming the entire through rate, however. I just fixed an arbitrary amount, an amount satisfactory to my line and collected that. When we went to settle with the T. & P. the basis adopted was 6¼ cents, which was their division of the 12½ cent rate applying under the commission tariff, this was all they would take. Witness was asked: Under a division of the established rate the T. & P. would not have gotten that much.

Re-direct examination:

I did not make the settlement with the T. & P. and I do not know on what basis the money was tendered. If as a matter of fact it was shown in their monthly account that the Santa Fe had col-
66 lected $165 that was equivalent to a tender to the T. & P., and notification of willingness on the part of the Santa Fe to prorate that $165; we have at all times been willing to give the T. & P. out of the 25 cents per 100 lbs. which we collected to Goldthwaite, whatever might appear as their proper proportion from Texarkana to Fort Worth of the through rate from Kansas City to Goldthwaite; always have been ready to do that. Until I examined these papers here, I did not know what their proportion was, because I was not interested in it.

Examined by the COURT:

Thirty six per cent. of the rate applicable from Kansas City to Goldthwaite is the proportion and after the T. & P. and other lines from Kansas City to Texarkana and that rate is 35 cents. I do not know and had no means of knowing what proportion of that amount properly accrued to the T. & P. for the transportation from Texarkana to Fort Worth out of the through rate of 35 cents from Kansas City to Goldthwaite—had no means of knowing what propor-

tion the T. & P. road independent of what the Kansas City Southern or Iron Mountain was entitled to; our arrangements were with the T. & P. alone and it made its own arrangements with the other roads. On the 25 cent basis, the same percentage, 64 per cent. to us, would not apply. There is no agreement between ourselves and the T. & P. which would fix a division that their line is entitled to receive out of a 25 cent rate from Texarkana to Goldthwaite. Under the Interstate Commerce Commission tariff, if there was 35 cents charged from Kansas City, we got 64 per cent. Witness was asked: Now under the same tariff rate, if the rate is 25 cents clear through, what proportion does your road get of that—64 per cent.? And answered: Twenty five cents from Kansas City to Goldthwaite does not apply via T. & P. and Texarkana, it applies only via the Atchison, Topeka & Santa Fe, and Gulf Colorado & Santa Fe.

Re-cross examination:

At the time this 25 cent rate was charged I knew that part of the freight on this shipment had been paid because it was billed
67 from Texarkana; at that time I did not know how much had been prepaid, but regarding it as an interstate shipment I put on the very minimum that they could have been entitled to from Kansas City by any road The Santa Fe railroad has at all times been ready since that time to prorate that rate with the other carriers interested on the proper basis.

Agreement.

It was agreed that the two cars of corn in question were originally shipped from Hudson, South Dakota, under a bill of lading showing under the head "Marks & consignee," in the said bill as follows: "Forrester Bros. Texarkana, Texas. Care Kansas City Southern at Kansas City, Mo. Stop at Kansas City for inspection and transfer." The said bill of lading being issued by the Chicago, Milwaukee & St. Paul Ry. Co. and containing a provision limiting the liability of each carrier to its own road, and providing that the said C. M. & St. Paul Ry. Co. should not be liable beyond its own line; and said corn was shipped under a way bill covering freight to be forwarded from Hudson, S. D. to Kansas City, Mo., showing on the face of said bill the consignee as Forrester Bros. Texarkana, Texas. The said way bill contained a notation to "Stop at Kansas City for inspection and transfer." The corn was shipped from Kansas City, Mo., over the Kansas City Southern Ry. Co. under a bill of lading made out at Kansas City to Forrester Bros. showing the consignee and marked as follows: "Shippers order. Notify Harroun Commission Co., Texarkana." The bill of lading from Kansas City being executed by the Kansas City Southern Ry. Co. and marked on the face "Freight prepaid, 14c. per hundred lbs."

That the rate of freight paid on the said corn into Kansas City from Hudson, S. D. was 18c. per hundred pounds, and the rate of freight paid on the corn from Kansas City to Texarkana, Texas, was 14c. per hundred pounds, making a total freight paid from Hudson South Dakota to Texarkana, Texas, of 32c. per hundred pounds. That the corn reached Kansas City Dec. 17th and was transferred from C. M. & St. P / Ry. cars to the P. & G. cars at that point. That it was unloaded and sacked at Kansas City.

68 Letter from McReynolds & Co. to Isbel & Co.

Defendant offered in evidence the following letter :—

Chicago. McReynolds & Company, Grain. S. Louis.

Elevators. Office, Security building.

McReynolds "A" Chicago 1500000 bu.
McReynolds "B" Chicago 1000000 "
McReynolds "C" East St. Louis 1000000 bu.

ST. LOUIS, Mo., March 7, 1902.

Isbell & Co., Odessa, Texas.

GENTLEMEN: We have your favor of the 5th, inquiring about car of corn. It has indeed taken a long time for this car to reach Texarkana. As you know, the same was billed first to that point, and we expect to rebill it from there on Texas Commission rates. We save considerable in freight in doing this. We are tracing for return of bill of lading to day, and will get you papers as soon as possible; will also have the Texarkana agent wire tracer from there.

Yours truly, McREYNOLDS & COMPANY.

C. H.

R. FENBY.

R. FENBY, by deposition for plaintiff, in rebuttal testified: "I am auditor of the T. & P. Ry. Co. I know of no arrangement between the T. & P. Ry. Co. and the G. C. & S. F. Ry. Co. by which either of the said roads is authorized to contract for delivery of freight upon the line of the other road, other than is provided for by law. The T. & P. Ry. Co. is a common carrier, and as such receives freight destined to points on the G. C. & S. F. Ry. Co. to be delivered to the G. C. & S. F. Ry. Co. at some junction point, and also receives
69 freight from the G. C. & S. F. Ry. Co. to be delivered to some point on the T. & P. Ry. This it is required by law to do. A copy of the division sheet covering commodities of this kind is attached to this deposition. Assuming that the car of corn in question weighing 66,000 lbs., the rate as per schedule 168-T, of the State railroad commission being 12½c. per 100 lbs., the transportation charges would amount to $82.50, the G. C. & S. F. Ry. Co. be-

ing entitled to retain 50% or $41.25, and being required to pay the T. & P. Ry. Co. $41.25. The G. C. & S. F. Ry. Co. has paid the T. & P. Ry. Co. $41.25 as its proportion of the charges on the corn, but the settlement has not been offered on any other basis than that of a rate of 12½c. per 100 pounds.

Cross-examined:

"The publication of joint through rates between the T. & P. Ry. Co. and the G. C. & S. F. Ry. Co. or such other carriers as may be parties to such through rates, necessarily carries with it an agreement for a division of the rate, and agreements covering divisions on various commodities are made between the T. & P. Ry. and carriers with whom it has through joint rates. The tariffs themselves do not fix or provide for a division of the rates, but the division is a matter of agreement between the carriers, both on State and interstate business. On State business, when the carriers cannot agree upon a division of the rate, the railroad commissioner fixes the division. The T. & P. Ry. Co. has no authority to bind the G. C. & S. F. Ry. Co. or to act for it under any conditions, and it is a fact that the T. & P. Ry. Co. is only authorized to collect the legally established rates, and neither the T. & P. Ry. Co. nor the G. C. & S. F. Ry. Co. is bound by any quotation of a rate that is not in conformity with the legally established rate. The T. & P. Ry. Co. is not interested in any part of the property loss that may be sustained by the G. C. & S. F. Ry. Co. in handling shipments over its line, and *vice versa*, and neither road, under any conditions, undertakes to answer for the faults or negligence of the other.

Where there are joint through rates on interstate business,
70 the published tariff fixes the rate that is divided between the carriers, the carriers agreeing upon the division. Each carrier is interested in the amount received by the other carrier to the extent of getting its agreed division out of the through rate.

As to the State business, the railroad commission establishes the rate, and the roads agree on a division of this rate, and when they cannot so agree, the commission fixes the division between the roads, the only difference between the State and interstate business being that the railroad commission fixes the rate on State business, and the railroads agree and fix the rate on interstate business. The railway companies agree on a division of the interstate rate, and also agree on a division of the State rate, and when they cannot agree, the commission fixes a division of the State rate.

The T. & P. Ry. Co. does not recognize the G. C. & S. F. Ry. Co. as its agent for the purpose of collecting the rate or binding it by any rate, and does not recognize that it is bound by any other rate other than may have been legally established. There is no more community of interest or joint undertaking between the G. C. & S. F. Ry. Co. and the T. & P. Ry. Co., where there is a joint through rate, than where there is no joint through rate.

The T. & P. Ry. Co.'s proportion was 3.5 cents per hundred pounds out of the through rate applying on shipments of corn in car loads from Kansas City via Texarkana to Goldthwaite, Texas, in December 1901, and January 1902.

It is agreed by and between the parties to the above suit that the above and foregoing contains a true and correct statement of all the evidence offered on the trial of the above entitled and numbered cause.

C. K. BELL,
Attorney for the Plaintiff.
COWAN, BURNEY & LEE,
Attorneys for the Defendant.

Approved as a correct statement of facts and ordered filed
71 as a part of the record in said cause.

IRBY DUNKLIN, Judge.

Filed August 4th, 1902.

W. D. McVEAN,
District Clerk.

Appeal Bond.

Filed Aug. 8th, 1902.

In the District Court of Tarrant County, Texas.

THE STATE OF TEXAS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY. } No. 21600.

Know all men by these presents: that whereas in the above styled and numbered cause, in the said court, the State of Texas did on the 21st day of July, 1902, recover of the Gulf, Colorado & Santa Fe Railway Company the following judgment: "On this the 10th day of July, A. D. 1902, this cause came on for trial, whereupon both parties appeared by counsel and announced ready for trial, and, a jury having been waived, submitted the matters of controversy as well *as* of fact as of law to the court and the court having heard the evidence and argument of counsel, took the cause under advisement and subsequently, to-wit: on the 21st day of July, A. D. 1902, the further consideration of the cause was resumed, and because it is the opinion of the court that the law is with the plaintiff, it is therefore considered, ordered and adjudged by the court that the plaintiff The State of Texas do have and recover of and from the defendant the sum of one hundred dollars and all costs in this behalf expended, for which execution may issue, to which judgment the defendant excepted and in open court gave notice of appeal to the court of civil appeals of the second supreme judicial district of Texas. It is further ordered that the parties have ten days after

the adjournment of court in which to prepare and file statement of facts." From which judgment the said Gulf, Colorado & Santa Fe Railway Company has appealed to the court of civil appeals for the second supreme judicial district of Texas.

Now therefore the Gulf Colorado and Santa Fe Railway
72 Company as principal, and John Sealy and J. H. Hutchings, as sureties, hereby acknowledge ourselves firmly bound unto The State of Texas, appellee, in the sum of five hundred dollars,

Conditioned that if The Gulf, Colorado & Santa Fe Railway Company, appellant, shall prosecute its appeal with effect and in case the judgment of the supreme court or the court — civil appeals shall be against it, it shall perform the court's judgment, sentence or decree, and pay all such damages as said court may award against it, then this obligation shall be null and void; otherwise, to remain in full force and effect.

GULF, COLORADO & SANTA FE
RAILWAY COMPANY,
By J. W. TERRY, G. Solicitor, Principal.

JNO. SEALY,
J. H. HUTCHINGS, Sureties.

Approved,
W. D. McVEAN,
District Clerk.

THE STATE OF TEXAS, }
County of Galveston. }

I, Thos. D. Brick, clerk of the district court in and for said county of Galveston, do hereby certify that Jno. Sealy and J. H. Hutchings whose names appear signed to the annexed bond, are good, ample security for the amount therein stipulated; that they have property in said county subject to execution to a larger amount, and that if said bond was offered to me for approval, the same would be accepted and approved.

To certify which, I hereto set my hand and impress of my official seal at my office, in the city of Galveston, on this the 7th day of August 1902.

[L. S.]

THOS. D. BRICK,
Clerk District Court, Galveston County,
By J. C. GENGLER, Deputy.

Filed August 8th, 1902.

W. D. McVEAN,
District Clerk.

73 Assignment of Errors.

Filed Nov. 1st, 1902.

In the District Court of Tarrant County, Texas.

THE STATE OF TEXAS
vs.
GULF, COLORADO & SANTA FE RY. CO.

Now comes the defendant, The Gulf, Colorado & Santa Fe Railway Company, and assigns the following errors upon which it will rely for a reversal of the judgment heretofore rendered in this case:

(1.) The court erred in its conclusions of fact in this case in finding as follows:

"On December 26th, 1901, two days after this contract for purchase had been made, Hardin was informed that the corn with which Harroun Commission Company expected to fill his order would be sacked in Kansas City, and be shipped out of Kansas City to Texarkana, but at the time of making the contract he did not know from whence the corn would come." Because the undisputed evidence shows that on the 26th day of December, 1901, the Harroun Commission Co. wrote the Harding Grain Co. confirming the sale made to the Harding Grain Co. on the 24th of Dec. of the two cars of corn, reciting that the cars were to be held at the elevator of the Harroun Com. Co. for sacking; and the undisputed evidence is that this letter to the Harding Grain Co. correctly stated the terms of the contract and agreement of December 24th, and shows that at the very time the Harding Grain Co. bought the corn, it knew that the corn must come from a point outside of Texas.

(2.) The court erred in his conclusions of law in this case in finding that the shipment in controversy from Texarkana to Goldthwaite, Texas, was not an interstate shipment, but originated, and terminated in the State of Texas; and erred in that behalf in rendering a judgment against this defendant for a penalty, because the undisputed evidence and the court's conclusions of fact show that the shipment in question was an interstate shipment, and not subject to the rates and the regulations of the State commission,
74 and therefore there should be no recovery of penalty in this case.

(3.) The court erred in his conclusions of law in finding that the shipment in controversy was a State shipment, and erred in rendering judgment for penalty against this defendant because the undisputed evidence shows that the corn in question was bought by the Harding Grain Co. in Kansas City Mo. From merchants there with the then fixed purpose and intention that it should be transported and delivered to Goldthwaite, Texas, to Saylor & Burnett, without any breakage of bulk or transfer of any kind; and the undisputed evidence and the findings of the court show that when the grain

was bought in Kansas City, its ultimate destination was fixed at Goldthwaite, Texas, and when it left Kansas City, it began a journey to a destination fixed at Goldthwaite, and the shipment was therefore interstate commerce, and not subject to the rates, rules and regulations or jurisdiction of the State commission.

(4.) The court erred in finding in its conclusions of law that the shipment in controversy was not an interstate shipment, and erred in rendering judgment against this defendant for penalty, because the undisputed evidence shows, and the court so found, that the reason why the Hardin Grain Co. contracted for the corn to be delivered to them at Texarkana, was because they could fill their contract with Saylor & Burnett at Goldthwaite at about one and a half cents per bu. cheaper than if they had bought the grain delivered to them at Kansas City, and had shipped from Kansas City to Goldthwaite, and that the Hardin Grain Co. kept themselves informed of interstate commission freight rates, and of State commission rates, and the practically undisputed evidence shows that the only purpose of billing to Texarkana and rebilling from that point was to juggle with the rates and to avoid the interstate rate and to endeavor by makeshift and pretence to destroy the character of the shipment and make it appear to be a State shipment when it was an interstate shipment, all of which is expressly forbidden by the provisions of the interstate commerce law, and the attempted
75 subterfuge was of no effect and the shipment was and continued to be interstate and not State traffic, and not subject to the rules, regulations and rates of the State commission.

(5.) The court erred in assessing a penalty against this defendant in this case, because the undisputed evidence shows that the defendant had not intentionally been guilty of any overcharge, but that it and its officers unintentionally and through a mistake of fact and on the advice of its attorneys, charged the rate that was charged, believing the shipment to be interstate and not State traffic, and not subject to the rules and regulations of the State commission.

(6.) The court erred in finding the shipment in question to be an intrastate or domestic shipment, and subject to the Texas Commission rates, and erred in rendering judgment for a penalty against the defendant, because the undisputed evidence shows that the shipment in controversy was a shipment from Kansas City to Goldthwaite, and the undisputed evidence shows and the court so finds that defendant had with its connecting lines handling the shipment, established and published and under the provisions of the interstate commerce law filed with the Interstate Commerce Commission rates applying on such shipment, and to which under the law the shipment was subject, and was not subject to the State commission rate.

J. W. TERRY AND
COWAN, BURNEY & LEE,
Att'ys for Defendant.

Filed Nov. 1st 1902.
M. H. HARDIN,
District Clerk.

76 Bill of Costs.

STATE OF TEXAS, Plaintiff,
vs.
G., C. & S. F. RY. Co., Defendant. } No. 21600.

M. —— —— as Principal and —— —— as Sureties to Officers of Court, Dr.

To costs accrued in above entitled cause to adjournment of May term, 1902:

Clerk's fees.	P't'f.	Def.	Sheriff's fees.	P't'f.	Def.
Filing and docketing	.35		Executing citations		
Issuing citations or writs			Executing precepts		
Copy petition			Executing subpœnas		
Recording returns			Executing notices	1.10	
Assessing damages	.50		Sheriff jury fee	.50	
Filing papers	.30	.60			
Copy interrog. for precepts			Total	1.60	
Issuing precepts					
Copy interrog. for com.			Jury fee		
Issuing commission			Witness fees		
Certificates	.80	1.85	Notary fees		
Issuing subpœnas			W. O. Rhea, Jr.,		
Affidavits			N. P.	4.25	
Motions			W. P. Mahaffey,		
Entering appearances	.15	.15	N. P.		4.50
Entering continuances	.20		Clerk's cost		
Entering orders			Brought over	3.85	55.55
Swearing jury, etc.				9.70	60.05
Swearing witnesses	.30	.30		60.05	
Filing and approving bond		1.65			
Issuing notices		1.50			
Final judgment	1.00			$69.75	
Taxing costs	.25				
Issuing execution and return					
Issuing order of sale and return					
Transcript		49.50			
Total clerk's fees	3.85	55.55			

77 Certificate.

THE STATE OF TEXAS, }
County of Tarrant. }

I, W. D. McVean, clerk of the district court of Tarrant county, Texas, do hereby certify that the above and foregoing transcript contains a true and correct copy of all the proceedings had in said cause No. 21600, The State of Texas,—*vs.*—Gulf, Colorado & Santa

Fe Railway Company as the same appears on file and of record in my said office.

Given under my hand and seal of said court at office in the city of Fort Worth, Texas, this the 3rd day of November A. D. 1902.

[SEAL.] M. H. HARDIN,
Clerk District Court, Tarrant County, Texas,
By —— ——, Deputy.

78 Endorsed: No. 4131. G. C. & S. F. Ry. Co., appellant, vs. State of Texas, appellee. From the district court of Tarrant county. Applied for by Cowan & Burney & Lee, attorneys for appellant on the 8th day of August, 1902, and delivered to C. K. Lee on the 3rd day of Nov., 1902. M. H. Hardin, clerk, district court, Tarrant county. By —— ——, deputy. Filed in the court of civil appeals, at Fort Worth, Texas, the 4th day of Nov., 1902. W. C. Strong, clerk, court of civil appeals, second supreme judicial district of Texas. No. 1236. 2nd dist. Filed in supreme court June 17, 1903. F. T. Connerly, clerk, by J. S. Myrick, deputy. Affirmed Feb'y 4, 1904.

79 Proceedings Had in Court of Civil Appeals, Second Supreme Judicial District, at Fort Worth.

Opinion of Court of Civil Appeals.

Filed March 7, 1903.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Appellant,
vs.
STATE OF TEXAS, Appellee. } No. 4131.

From District Court of Tarrant County.

Opinion.

This suit was duly instituted by the State of Texas acting by her attorney general, to recover a penalty for an alleged violation of art. 4573, Rev. Stats., in that appellant demanded and received a greater sum for freight than allowable under the rate fixed by the railroad commission of Texas upon a shipment of corn by the Samuel Hardin Grain Company from Texarkana, Texas, to Goldthwaite, Texas. The trial was before the court without a jury and resulted in a judgment in favor of the State. The facts as found by the trial court seem to be practically undisputed, the same not having been challenged save in a single particular as to which, however, we think the evidence is sufficient to support the finding, and which

therefore need not be further noticed. The trial court's conclusions of fact are as follows:

"1. The railroad commission of Texas, after due notice of the time and place where the rates would be fixed by it, fixed and established the rates which might be charged by a railroad or by two or more lines of railroad, whether under the same management and control or not, for the transportation of corn between
80 points within the State of Texas, in car load lots at 12½ cents per one hundred pounds for a distance of over 165 miles, which rate became effective on March the 10th, 1899, and remained effective until the present time, of which action the defendant and the Texas & Pacific R. R. Company received legal notice before the rates prescribed became effective.

"2. The distance from Texarkana, Texas, to Goldthwaite, Texas, over the Texas & Pacific railway to Fort Worth and from Fort Worth over the G. C. & S. F. railway to Goldthwaite, Texas, is more than 165 miles.

"3. The Texas & Pacific Railway Company owns and operates a railroad from Texarkana, Texas, to Fort Worth, Texas, and the defendant from Fort Worth, Texas, to Goldthwaite, Texas, and each of these points and all intermediate points on each of said roads are entirely within the State of Texas.

"4. The Texas & Pacific Railway Company executed a bill of lading dated Texarkana, Texas, January 13, 1902, which bill of lading purported to acknowledge the receipt from the Samuel Hardin Grain Company at Texarkana, Texas, of one car of sacked corn, same being car 3845 P. & G. and which bill of lading purported to show that the said corn was consigned to shipper's order notify Saylor & Burnett Goldthwaite, Texas.

"5. Said car load of corn was transported by the Texas & Pacific Railway Company to Fort Worth and there delivered to the defendant, and was by it received and transported to Goldthwaite, Texas, where it arrived on the 17th day of January, 1902, and Saylor & Burnett, who were acting for Samuel Hardin Grain Company tendered to the defendant's agent at Goldthwaite, $82.50 in payment of the freight charges thereon; the said agent declined to accept said amount of $82.50 in payment of said charges, and demanded $165.00 for the transportation of said car load of corn from Texarkana, Texas, to Goldthwaite, Texas.

"6. The agent of the defendant at Goldthwaite, Texas, charged, collected, demanded and received from Samuel Hardin Grain Company $165.00 for the transportation of said car load of 66,000 pounds of corn from Texarkana, Texas, to Goldthwaite, Texas;
81 in so charging, collecting, demanding, and receiving said $165.00 the said agent of the defendant was acting under instructions from the executive officers and attorneys of the defendant company, who believed and advised that said shipment was interstate commerce and his action in so doing was subsequently ratified by the defendant.

"7. The Samuel Hardin Grain Company made complaint to the railroad commission of Texas of the action of the defendant in charging more than 12½c. per hundred pounds for transporting said corn, whereupon the railroad commission investigated such complaint and ordered this suit to be instituted, in accordance with the provisions of article 4568 of the Revised Statutes of Texas.

"8. On December 23rd, 1901, the Samuel Hardin Grain Company at Kansas City, Mo., offered to sell Saylor & Burnett at Goldthwaite, Texas, No. 2 mixed corn at 86½ cents per bushel for delivery on Ry. track at Goldthwaite and this offer was accepted for two car loads of corn. This offer and acceptance was by telegraphic communication between the parties at their respective places of business. The Hardin Grain Company did not at that time have the corn but on Dec. 24th, 1901, to fill the order it contracted with the Harroun Commission Company at Kansas City for the purchase of two 66,000 pounds cars of No. 2 mixed corn at 75½ cents per bushel to be delivered at Texarkana, Texas, to the Hardin Grain Company. Previously to this the Harroun Commission Company had contracted for the purchase of two cars of corn to be delivered to it at Texarkana, Texas, and with these two cars it expected to and did fill the order of the Harroun Grain Company. These cars had originated at Hudson, S. D. The receiving carrier at Hudson was the Chicago, Milwaukee & St. Paul Railway Company who issued bills of lading limiting its liability to losses occurring on its road with a like limitation of liability of all other carriers who should handle said corn in transit to its destination. By the terms of said bills of lading the corn was consigned to "Forrester Bros. Texarkana Texas" and shipment made in cars of C. M. & St. P. Ry. Co., care of Kansas City Southern Ry. at Kansas City Mo. with the privilege to
82 stop the corn at Kansas City for inspection and transfer. The corn reached Kansas City on December 17th 1901, was there unloaded, sacked and transferred to the Kansas City Southern Railway Co., who on Dec. 31st, 1901, issued bills of lading reciting that the corn was loaded in cars No. 3845, P. G. and No. 4189 P. G. that same was received of Forrester Bros. and consigned as follows, 'Shippers order notify Harroun Commission Company Texarkana, Texas,' and reciting further that freight 14 cents per hundred lbs. was prepaid, and one of these cars to-wit, car 'No. 3845 P. G.' is the car in controversy in this suit.

"9. The Harroun Commission Co. paid no freight on the corn from Hudson, S. D. to Texarkana, Texas, as it had purchased it to be delivered at Texarkana.

"10. The freight on the corn from Hudson, to Texarkana was as follows, 18 cents per 100 lbs. from Hudson to Kansas City and 14 cents from Kansas City to Texarkana all of which was paid by the vendors of Harroun Commission Company. The minimum interstate rate from Hudson South Dakota to Goldthwaite, Texas, was 46 cents per 100 lbs. which would have been apportioned as follows:

18 cents from Hudson to Kansas City and 28 cents from Kansas City to Goldthwaite Texas. The G. C. & S. F. Ry. Co. the T. & P. Ry. Co. and the Kansas City Southern Ry. Co. together with other connecting lines from Kansas City, Mo. to Goldthwaite, Texas, had established a joint tariff of 35 cents per 100 lbs. on shipments from Kansas City to Goldthwaite via Texarkana and originating in Kansas City, had agreed on a division of that rate between them and had filed tariffs establishing such rate with the Interstate Commerce Commission and by such steps had brought itself within the provisions of the interstate commerce laws.

"11. The Hardin Grain Company's officers kept themselves informed of interstate commission freight rates and of the State commission rates and the reason why they contracted for the corn to be delivered to them at Texarkana was because they could fill their contract with Saylor & Burnett at Goldthwaite at about 1½ cents per bushel cheaper than they could if they had bought the corn for delivery to them at Kansas City and had shipped from Kansas City to Goldthwaite.

83 "12. At the time of the purchase contract between the Hardin Grain Company and the Harroun Commission Company, Hardin the manager of the former company intended that the corn to be thereby acquired should go to Saylor & Burnett and should be shipped to Goldthwaite, from Texarkana as soon as practicable, and on December 26th, 1901, two days after this contract for purchase had been made Hardin was informed that the corn with which Harroun Commission Company expected to fill his order would be sacked in Kansas City and be shipped out of Kansas City to Texarkana, but at the time of making the contract he did not know from whence the corn would come.

"13. On December 31, 1901, the date of shipment from Kansas City to Texarkana Harroun Commission Co. informed the Hardin Grain Co. that the corn to fill the latter order had been loaded to start to Texarkana and requested instruction as to how the corn should be shipped from Texarkana for the guidance of F. L. Atkins their agent at that place who would attend to such re-shipping for the Hardin Grain Company as per former understanding. Thereupon and in compliance with such request blank bills of lading were made out by the Hardin Grain Company in Kansas City and furnished to the Harroun Commission Company to be forwarded to F. L. Adkins. These bills of lading were to be executed by the Texas & Pacific Railway Company and F. L. Adkins as agent for the Hardin Grain Company and were for shipment of the corn to Goldthwaite, Texas, consigned to 'Shippers order notify &c.' giving the numbers and initials of cars which information had been furnished by the Harroun Commission Company and on January 14th 1902 the re-shipment having been made as per instructions the bills of lading duly executed by the Texas & Pacific Ry. Co. were by Harroun delivered to Hardin Grain Co., who thereupon paid the Harroun Commission Company $1779.64 the purchase price

previously agreed upon for the corn and the receipt of said blank bills of lading by the Harroun Commission Company was the first information had by that company of the intended final destination and disposition of the corn.

"14. Neither Hardin Grain Co. nor Harroun Commission Co. had any store or warehouse at Texarkana but under the
84 agreement between the two companies (Hardin and Harroun), one F. L. Adkins who was the agent of the Harroun Commission Co., and stationed at Texarkana re-shipped the corn at Texarkana for the Hardin Grain Company. That shipment was to Goldthwaite, Texas, over the Texas & Pacific Ry. Co. and the G. C. & S. F. Ry. Co. by bill of lading reciting its receipt from Hardin Grain Co. and consigned to 'Shippers order notify Saylor & Burnett Goldthwaite, Texas,' and was transferred under original seals and without breaking packages, to the Texas & Pacific Ry. Co., after having remained at Texarkana five days, the only thing done by F. L. Adkins was to surrender the Kansas City southern bill of lading have the cars set over on the T. & P. Ry. and take a bill of lading from the latter Co. The corn reached Texarkana January 7th, 1902, and was shipped out from Texarkana January 13th, 1902. The defendant was not a party to the bill of lading executed at Texarkana.

"15. On Dec. 31st, 1901, Hardin Grain Co. mailed to Saylor & Burnett an invoice of the corn, in the form of an account stating the car No.'s and initial, the amount of corn and price to be paid by Saylor & Burnett."

The assignments of error present in substance the single question of whether the trial court properly held that the shipment or commerce in question was intra state rather than interstate as is contended in behalf of appellant. If the shipment can be properly denominated local or intra state then it is admitted that the judgment must be affirmed. If otherwise then it is as frankly admitted, as it must be, that the Texas Railroad Commission law and regulations have no application and that the judgment should be reversed and here rendered for appellant. Gibbons *v.* Ogden, 22 U. S., 1; Hardy *v.* A. T. & S. F. Ry. Co., 32 Kansas, 698 (5 Pac. Rep., 6); Houston Nav. Co. *v.* Ins. Co., 89 Texas, 1; Fielder *v.* M. K. & T. Ry. Co., 46 S. W. Rep., 633. We have found no case that, as seems to us, presents the precise state of facts and the difficulty we have had in the solution of the question presented has been in the construction of the facts rather than in the consideration of the numerous cases which have been considered, but which in the interest of brevity we will not undertake to distinguish. We have however finally concluded that we can not disturb the
85 trial court's conclusion.

That the transportation of the two cars of corn from Texarkana, Texas, to Goldthwaite, Texas, to which, at the instance of the railroad commission of Texas, the attorney general has sought by this suit to have the freight rate fixed by that com-

mission applied, comes literally within the terms of the Texas commission statutes, which undertakes to regulate transportation "between points within this State," can not be denied; but the insistence on the part of appellant is, that said transportation was but a part of a more extended and continuous shipment from South Dakota or Kansas City, Mo., to Goldthwaite, Texas, and therefore an interstate shipment, subject alone to the through freight rate agreed upon and filed with the Interstate Commerce Commission by the several carriers interested.

It is undisputed that the grain in question was originally shipped from Hudson S. D. to Texarkana, Texas. When this shipment began in South Dakota the subject matter of the shipment became an article of commerce between the States of South Dakota and Texas, and this interstate character continued until its arrival at Texarkana but no longer as we think must be conceded unless it can be said that the stoppage *in transitu* at Kansas City, or the fact of a change in ownership at that point is of controlling effect to the contrary. The findings and evidence show that the corn constituting the subject matter of the shipment in question had arrived and had been purchased and placed in the elevators of the Harroun Commission Company at Kansas City for the purpose of cleaning and sacking before the contract of the Hardin Grain Company to purchase it. It is not shown or contended that a shipment with stop over privileges for such purpose is a regulation in contravention of the acts of Congress or of rules of the Interstate Commerce Commission or that such stipulation is unreasonable, or that it *ipso facto* changes the character of the original shipment. Such stoppage *in transitu* is not shown to be colorable, and if not, seems to be an aid to and in the interest of the commerce of the country rather than the contrary, in that at convenient centers where facilities therefor have been prepared large quantities of the subjects of commerce may be concentrated or condensed and its further transportation
86 largely facilitated as is the constant practice in the case of cotton in our own State; and we know of no case in which it has been held that a stoppage of such character and with such temporary purpose destroys or alters the status of the commodity as fixed by the original shipment. The case of Waggoner *v.* Whaley, 50 S. W. Rep., 153, by this court, may be referred to as tending to so show. The cattle constituting the shipment in that case were driven from Oklahoma Territory to Waggoner, Texas, and there shipped under contracts fixing Chicago, Illinois, as final destination but with provision for stoppage in transit at Bowie, Texas, for purpose of feeding. From an examination of that case, however, it will appear that Chicago was not the definitely fixed place or untimate destination at the time of the inception of the transit at Waggoner.

The freight had been paid to Bowie only. No definite time of stoppage had been fixed and when finally again started on their journey new shipping contracts were made and some of the cattle

were shipped to Chicago, some to Kansas City and some to New Orleans for export; the owner testifying in relation to the original contracts of shipment that "I always had the right and exercised it to ship the cattle out from Bowie to any other place, or to sell them to other parties to be transported from Bowie in any manner or to any place that they might choose, or to do anything else with them that might be desired." The appellants in that case had exclusive control and management of the cattle while at Bowie and we held that the purpose of the original carriage contracts evidently was to enable the appellants in that case to fatten the cattle at their pens at Bowie and have them carried to market without the expense of the local freight charge from Waggoner to Bowie, and so concluding we held in effect that the transit of the cattle as shown on the face of the original contracts had been so interrupted as that such cattle had acquired a situs within the State of Texas within the meaning of our laws on the subject of taxation.

In the case before us now, however, no finding requires the conclusion that at the time of the original shipment in South Dakota any place other than Texarkana was intended as the final
87 destination. As stated the freight was prepaid to that place and after cleaning and sacking the corn was continued on its journey to Texarkana consigned to the order of the original shipper and over the railway in care of which it had been first shipped. We hence conclude that the character of the original shipment was not altered by the mere stoppage in Kansas City.

If not, we fail to see why such effect should be given the several sales or contracts of sale shown. The Harroun Commission Company had purchased or contracted for the corn to be delivered at Texarkana sometime prior to the later contracts of sale, and to fill its order therefor the Hardin Grain Company contracted for Texarkana delivery not knowing at the time but that the required corn was then there situated. These transactions are not impugned by the findings as having been done in bad faith or with a purpose to thereby avoid the effect of the interstate commerce law. It is true that the court finds that the Hardin Grain Company bought with delivery at Texarkana, because thereby they could procure corn with which to fill their order for about 1½ cents per bushel less than had the corn been purchased with delivery at Kansas City, and that this difference in price evidently could result only by an application of the freight rates of the Texas Railroad Commission from Texarkana to Goldthwaite instead of the interstate commerce rate between the same points. But we can not think that these facts require the conclusion that the purchase by the Hardin Grain Company with delivery at Texarkana was a mere pretext to avoid the operation of the interstate commerce law. It seems under the circumstances rather to have been an advantage taken of an existing condition. The commission company had corn to be delivered at Texarkana; the Hardin Grain Company desired corn which if delivered at that point would enable them to fill the order of Saylor & Burnett at less

cost than if the corn had been purchased and delivered in Kansas City. And while the well established doctrine of exclusive control of Congress over interstate commerce may be important, yet freedom of contract in relation to the subject matter of such commerce is likewise of vital importance, and such contracts when made
88 that in nowise are forbidden by law, and that are not found to be designed with a view of avoiding the legitimate exercise of the power of Congress over the subjects of interstate commerce, should be upheld. The Hardin Grain Company acquired no title or fixed right in the grain in question until its delivery at Texarkana. It was evidently not so intended in advance of delivery as held in the case of Ervin *v.* Edwards, 47 S. W. Rep., 719, nor was there an examination and acceptance of the corn in Kansas City so as to there pass title to the Hardin Grain Company within the principle decided in Maud *v.* Coppinger, 56 S. W. Rep., 127. Until actual delivery by the Harroun Commission Company at Texarkana its mere contract to sell to the Hardin Grain Company could lawfully have been complied with by a seasonable delivery at Texarkana of any other corn of like grade, quality and quantity. But when delivered as was done not only the title but also the actual possession passed to the Hardin Grain Company. The commission company then lost all further control; the carrier from Kansas City had then entirely fulfilled its contract of carriage not being required by any law or shipping contract to deliver to a connecting carrier as in the case of the Houston Nav. Co. *v.* Ins. Co., 89 Texas, 1. After delivery to the Hardin Grain Company at Texarkana the corn was in possession and control of no other person or carrier in any capacity until that company entered into an absolutely necessary new contract for further transportation. When so delivered the interstate character of the commodity ceased and the corn then became in all essential particulars incorporated in the mass of property in this State and the new shipment, which was some five days after the delivery at Texarkana, was substantially a new one.

In the case of Brown *v.* Houston, 114 U. S., 622, L. Ed. bk. 29, page 257, coal was sent by the owners in Pennsylvania to their agent in New Orleans to be there sold for their account. Upon its arrival taxes were assessed against the coal while contained in barges upon which it had been originally shipped and before disposition, and the collection was resisted upon the ground that the coal in question had not lost its character as an interstate commerce commodity; but it was held that upon its arrival in New Orleans it be-
89 came a part of the general mass of property of the State of Louisiana, and this without reference to the fact that the coal at the time of the taxation had not been changed from the form in which it had been originally shipped, and the further fact that some of it had been sold for export. So here, we do not think that the fact that no change was made at Texarkana of the grain in question from the cars in which it was originally shipped is decisive in favor of appellant's contention. When delivered at Texarkana the inter-

state commerce transit was ended and it is immaterial, it seems to us, whether the corn was then stored in elevators and thereafterwards sold in Texarkana, or, as was done, shipped to Goldthwaite to complete the contract of sale made by the Hardin Grain Company with Saylor & Burnett.

The foregoing view also harmonizes with the view of this court in the unreported case of The Southern Kansas Railway Company of Texas *v.* Stump & Weaver, appealed from Roberts county, and decided March 6, 1897. That was a case in which Stump & Weaver at Miami ordered of John Haggart, at Panhandle City a certain car of coal for delivery at Miami, both these points being situated in Texas. To fill this order Haggart purchased the coal in the State of Colorado and caused it to be shipped to Panhandle City where it was unloaded, reloaded by Haggart upon other cars and reshipped to Miami. This court held that the interstate shipment ended at Panhandle City; that the shipment from that point to Miami was an intrastate shipment, and that the rates of the Texas railroad commission applied thereto rather than those of the Interstate Commerce Commission. The case of The State *v.* The Southern Kansas Railway Company of Texas, 49 S. W. Rep., 253, based upon a very similar state of facts may seem, as is urged, to conflict therewith. The cases, however, are apparently distinguishable, at least as appears to some of us, in that in the case by the court of civil appeals of the third district, last above referred to, it was expressly found in effect that at the time of the order by Stump & Weaver they, as well as Haggart, contemplated that the coal would be purchased in Colorado and that the shipment was made to take the form it did with a view to thereby evade the operation of the interstate com-
90 merce rate of freight from Panhandle City to Miami, which was greater than the Texas rate. No such state of facts was found in the case by this court referred to.

It is insisted, however, that the purpose or intent of the parties is irrelevant and immaterial. It may be and is doubtless so, when such purpose does not enter into the question of fact involved. But when necessary to determine the character of the shipment or the status of the property as interstate commerce or otherwise it may undoubtedly be considered. The purpose of the shipper, as an element of the fact to be found, was ascertained and given effect not only in the cases of Waggoner *v.* Whaley and The State *v.* Gulf, C. & S. F. Ry. Co., 44 S. W. Rep., 542, *supra* but also in Cutting *v.* The Florida Ry. & Nav. Co., 46 Fed. Rep., 641, as may be seen from an examination of those cases. See also sec. 7 interstate commerce act. p. 3155, vol. 3, U. S. Compiled Stats., 1901.

While perhaps at the risk of being considered prolix we will add in view of the importance of the question under consideration that whether or not the transportation between the Texas points was a constituent of a continuous shipment of interstate commerce does not necessarily depend upon the fact that the corn was imported from South Dakota or Kansas City to Texarkana, Texas, immedi-

ately preceding its transportation to Goldthwaite, Texas, nor upon the fact that it was carried to the last named place in the same cars in which it had been carried from Kansas City, but rather upon the character of the transaction between the Samuel Hardin Grain Company and Saylor & Burnett, in pursuance of which the corn was carried from Texarkana to Goldthwaite. Or in other words, whether the Samuel Hardin Grain Company in selling and shipping the corn for delivery to Saylor & Burnett were engaged in State or interstate commerce. That the transaction between the Samuel Hardin Grain Co. and the Harroun Commission Co., in pursuance of which the corn was forwarded from Kansas City to Texarkana and there delivered by the latter to the former, was one of interstate commerce, does not admit of controversy. But because the Samuel Hardin Grain Company were engaged in interstate commerce in buying the corn does not prove that they were also
91 engaged in interstate commerce in selling it. Every wholesale dealer in Texas may be said to be engaged in interstate commerce when he makes purchases in pursuance of which goods are shipped to him from other States, but it would not do to hold that in selling and reshipping these goods to his Texas customers he is also engaged in interstate commerce, even though he should reship them in the same cars and to fill orders accepted prior to the purchase of the goods. The purchase from the non-resident owner and the through shipment in pursuance thereof constitute interstate commerce, but when that transaction is fully accomplished and the resident dealer becomes the owner and possessor of goods situated in Texas, goods which have thus reached the destination given them by the seller and shipper, they become a part of the general property of the State and if sold and reshipped to another point in the State such sale and shipment constitute commerce within this State and not interstate commerce. This principle was applied by this court in deciding the case of Southern Kansas Railway Company *v.* Stump & Weaver, before referred to. As a purchaser and importer of Colorado coal Haggart was engaged in interstate commerce, but in selling and reshipping it to his Texas customers he was engaged in State commerce, and we held in that case that the nature of his local business was not changed merely because when he ordered a given car of coal from Colorado he intended to reload and reship it from Panhandle to Miami to fill an order already placed with him by Stump & Weaver who were engaged in business at the latter place. We see no reason to doubt the soundness of that decision, and the only question of difficulty is whether this case comes within the ruling there made. The Samuel Hardin Grain Company had no office or place of business in Texas and may thus be said to be in a position different from that of Haggart, their business being, as testified by the manager, "that of coliciting orders from Kas., Mo., I. T,, Tex., and other States and when such orders are (were) received to buy the commodities and fill such orders as quickly as possible," with their office in Kansas City. But it matters

not what their general course of business may have been, provided in this instance they were engaged in commerce
92 within this State, and we have finally concluded that they were, or at least that we would not be warranted in disturbing the trial court's finding to that effect. If the two cars of corn had reached Texarkana, the ultimate destination of the original shipment, and had been there delivered to the Harroun Commission Company before any negotiations took place between the two companies at Kansas City and the grain company had then bought and reshipped the corn to Goldthwaite the transaction would undoubtedly have been entirely local. Brown *v.* Houston, 114 U. S., *supra*. But under the peculiar facts of this case, should not the corn be treated as constructively in Texarkana, where it was then due as its place of destination under the then pending shipment with all freight charges paid, when the negotiations took place at Kansas City? We incline to think so. Certain it is that the parties did not understand or intend that the grain company should acquire any title to or have anything to do with the corn till it was delivered to them in Texas.

The court found against the contention, the most plausible urged by the appellant, that the transactions took the form they did to disguise a real interstate shipment and we feel bound to respect this finding. We think, therefore, the case is not to be distinguished in principle from Ry. Co. *v.* Stump & Weaver, *supra*, which we think was correctly decided, and we know of no decision of our supreme court or of the Supreme Court of the United States in conflict with it, and the judgment will be accordingly affirmed.

CONNER,
Chief Justice.

(Endorsed:) With app. No. 3780. No. 4131. G. C. & S. F. Ry. Co., appellant, *vs.* State of Texas, appellee. Affirmed. Filed in court of civil appeals for second supreme judicial district of Texas, Mar. 7, 1903. W. C. Strong, clerk. Opinion by Conner, chief justice. Filed in supreme court May 8, 1903. F. T. Connerly, clerk.

93 Judgment of Court of Civil Appeals.

March 7, 1903.

G., C. & S. F. Ry. Co.
vs.
The State of Texas. } 4131.

From District Court of Tarrant County, March 7, 1903. Opinion by Mr. Conner, Ch. J.

This cause came on to be heard on the transcript of the record, and the same being inspected because it is in the opinion of the

court that there was no error in the judgment. It is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellee, The State of Texas, do have and recover of and from the appellant, The Gulf, Colorado & Santa Fe Railway Company and its sureties, Jno. Sealy and J. H. Hutchings, the amount as adjudged below, together with all costs in this behalf expended and that this decision be certified below for observance.

Motion for Rehearing.

Filed March 21, 1903.

In the Court of Civil Appeals, Second Supreme Judicial District of Texas, at Fort Worth.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Appellant,
vs.
STATE OF TEXAS, Appellee.

Motion for Rehearing.

Now comes the appellant, The Gulf, Colorado & Santa Fe Railway Company, and moves the court to grant it a rehearing in the above entitled and numbered cause, and to set aside the judgment of affirmance herein, on the following grounds to-wit:

I.

The court erred in failing to sustain the first assignment of error of appellant, which is as follows:

(1.) The court erred in its conclusions of fact in this case,

94 in finding as follows:

"On December 26th, 1901, two days after this contract for purchase had been made, Hardin was informed that the corn with which Harroun Commission Company expected to fill his order would be sacked in Kansas City, and be shipped out of Kansas City to Texarkana, but at the time of making the contract he did not know from whence the corn would come."

Because the undisputed evidence shows that on the 26th day of December, 1901, the Harroun Commission Company wrote the Hardin Grain Company, confirming the sale made to the Hardin Grain Company on the 24th day of December of the two cars of corn, reciting that the cars were to be held at the elevator of the Harroun Commission Company for sacking; and the undisputed evidence is that this letter to the Hardin Grain Company correctly stated the terms of the contract and agreement of December 24th, and shows that at the very time the Hardin Grain Company bought the corn, it knew that the corn must come from a point outside of Texas.

II.

The court erred in failing to sustain the second assignment of error of appellant, which is as follows:

(2.) The court erred in his conclusions of law in this case in finding that the shipment in controversy from Texarkana to Goldthwaite, Texas, was not an interstate shipment, but originated, and terminated, in the State of Texas; and erred in that behalf in rendering a judgment against this defendant for a penalty, because the undisputed evidence and the court's conclusions of fact show that the shipment in question was an interstate shipment, and not subject to the rates and the regulations of the State commission, and therefore there should be no recovery of penalty in this case.

III.

The court erred in failing to sustain the third assignment of error of appellant, which is as follows:

(3.) The court erred in his conclusions of law in finding that the shipment in controversy was a State shipment, and erred in rendering judgment for penalty against this defendant, because the
95 undisputed evidence shows that the corn in question was bought by the Hardin Grain Co. in Kansas City, Mo., from merchants there, with the then fixed purpose and intention that it should be transported and delivered to Goldthwaite, Texas, to Saylor & Burnett, without any breakage of bulk or transfer of any kind; and the undisputed evidence and the findings of the court show that when the grain was bought in Kansas City, its ultimate destination was fixed at Goldthwaite, Texas, and when it left Kansas City, it began a journey to a destination fixed at Goldthwaite, and the shipment was therefore interstate commerce, and not subject to the rates, rules and regulations or jurisdiction of the State commission.

IV.

The court erred in failing to sustain the fourth assignment of error of appellant, which is as follows:

"The court erred in finding in its conclusions of law that the shipment in controversy was not an interstate shipment, and erred in rendering judgment against this defendant for penalty, because the undisputed evidence shows and the court so found that the reason why the Hardin Grain Co. contracted for the corn to be delivered to them at Texarkana, was because they could fill their contract with Saylor & Burnett at Goldthwaite at about one and a half cents per bushel cheaper than if they had bought the grain delivered to them at Kansas City, and had shipped from Kansas City to Goldthwaite, and that the Hardin Grain Co. kept themselves informed of Interstate Commission freight rates and of State commission rates, and the practically undisputed evidence shows that the only purpose of billing to Texarkana and re-billing from that

point was to juggle with the rates and to avoid the interstate rate and to endeavor, by makeshift and pretence, to destroy the character of the shipment and make it appear to be a State shipment when it was an interstate shipment, all of which is expressly forbidden by the provisions of the interstate commerce law, and the attempted subterfuge was of no effect and the shipment was and continued to be interstate and not State traffic, and not subject to the rules, regulations and rates of the State commission.

96 V.

The court erred in failing to sustain the fifth assignment of error of appellant which is as follows:

The court erred in finding the shipment in question to be an interstate or domestic shipment, and subject to the Texas Commission rates and erred in rendering judgment for a penalty against the defendant, because the undisputed evidence shows that the shipment in controversy was a shipment from Kansas City to Goldthwaite, and the undisputed evidence shows, and the court so found, that defendant had with its connecting lines handling the shipment, established and published, and under the provisions of the interstate commerce law, filed with the Interstate Commission, rates applying on such shipment and to which under the law the shipment was subject, and was not subject to the State commission rate.

VI.

The court erred in failing to sustain the sixth assignment of error of appellant which is as follows:

The court erred in assessing a penalty against this defendant in this case, because the undisputed evidence shows that the defendant had not been intentionally guilty of any overcharge, but that it and its officers unintentionally, and through a mistake of fact, and on the advice of its attorneys, charged the rate that was charged, believing the shipment to be interstate and not State traffic, and not subject to the rules and regulations of the State commission.

VII.

Because the court erred in finding that this appellant has insisted that the transportation of the corn in controversy was but a part of a more extended and continuous shipment from South Dakota to Goldthwaite, and therefore an interstate shipment, because such finding is directly contrary to appellant's contention in this case, its contention being that the testimony does not warrant a finding that this was a shipment from South Dakota to Texarkana, but to the contrary that the testimony clearly shows, and there is no finding by the trial court to the contrary, that the shipment was from South Dakota to Kansas City with the right to reship to Texarkana

97 if desired, but that the journey of the corn was to all practical legal intents and purposes at an end when it got to Kansas

City; and that there is absolutely no testimony in this record to support a finding and claim that this was a continuous shipment from South Dakota to Texarkana, but, to the contrary, that the record clearly shows that the billing from South Dakota to Texarkana was a mere matter of convenience and that it did not fix the destination of the shipment at all, and that if *he* had not been for Saylor & Burnett buying the corn from Hardin, there is nothing to suggest that the corn would ever have gone to Texarkana; it might just as well have gone to New Zealand or the North Pole, and the court's opinion is not a correct reflection of the record or the contention of appellant.

VIII.

Because the court erred in finding in its opinion "It is undisputed that the corn in question was originally shipped from Hudson, S. D. to Texarkana," because such is not the undisputed evidence. The testimony clearly shows that while there may have been a paper billing of the grain to Texarkana, that the true intent of the parties was that it should be carried to Kansas City and afterwards carried to Texarkana only if the consignor, consignee, or owner afterwards concluded it was desirable to do so, but otherwise it would be shipped anywhere they wished. That is, the testimony clearly shows that the facts in this case so far as the alleged transportation from South Dakota to Texarkana, is concerned, bring the case directly and expressly within the ruling of Waggoner *v.* Whaley, decision by this court referred to in this court's opinion.

IX.

Because this court erred in finding in its opinion "The findings and evidence shows that the grain constituting the subject matter of the shipment in question had arrived and had been purchased and placed in the elevators of the Harroun Commission Co. at Kansas City for the purpose of cleaning and sacking before the contract of the Hardin Grain Co. to purchase it;" because there is no evidence to support any such finding, nor any conclusion of the trial court to support any such finding.

98

X.

This court erred in holding that there was no finding that required the conclusion that at the time of the original shipment in South Dakota, any other place than Texarkana was intended as final destination, because there is no finding that forbids any such conclusion, and the undisputed evidence shows that naming Texarkana as the destination of shipment was purely a matter of convenience and a makeshift, and that the real destination of the shipment when it left South Dakota was Kansas City, and that whether it ever went beyond Kansas City or not depended upon what disposition was made of it at Kansas City, and the statement by the court

in its opinion that Texarkana was intended as its final destination is without support in the record; and the court's opinion predicated upon this finding, if any, results in the failure of the court to determine the material question that both the appellant and the appellee asked the court to decide, to-wit, whether if said shipment had originated at Kansas City and had belonged to the Hardin Grain Co. at the time it was sold to Goldthwaite parties, and was billed to Texarkana and re-billed from there, would this have changed its character as interstate commerce.

XI.

Because this court erred in finding that the corn was cleaned and sacked at Kansas City and that it was only stopped at Kansas City for that purpose and as soon as that was done, it continued on its journey to Texarkana consigned to order of the original shipper.

XII.

Because this court erred in finding that the Harroun Com. Co. had purchased and contracted for the corn to be delivered at Texarkana some time prior to the contract of sale to Hardin, because such finding is without support in the record.

XIII.

Because this court erred in finding that the Hardin Grain Co. contracted for Texarkana delivery not knowing at the time but that the grain was then there, such finding, in judgment of coun-
99 sel, being absolutely without warrant in the evidence, as every part of the evidence tends clearly to show that Hardin knew very well that this corn was not at Texarkana, and that the letter of confirmation of sale written by Harroun shows by express terms that both parties understood that the corn was then in Kansas City.

XIV.

Because the court erred in finding that these transactions (to-wit, the transaction between Harroun and Hardin, and the simulated billing to Texarkana for the purpose of getting the benefit of the State rate) are not impugned by the findings of the trial court as having been done in bad faith for the purpose of and to thereby avoid the effect of the interstate commerce law; because the trial court finds that the reason why the Hardin Grain Co. contracted for the grain to be delivered to them at Texarkana was to get the advantage of a cheaper rate.

Appellant shows that counsel for appellee is the Hon. C. K. Bell attorney general at Austin, Texas, upon whom service of this motion can be had.

Premises considered appellant prays the court to grant a rehear-

ing in this case, and for a reversal of the judgment heretofore rendered herein, but in the event the court should find against this prayer, then it prays for a reformation of the conclusions and of the opinion of this court in the particulars in which this appellant regards the same as erroneous, as shown by its grounds of this motion *supra*.

J. W. TERRY &
COWAN, BURNEY & LEE,
Counsel for Appellant.

(Endorsed:) With app. No. 3780. 3903/4131. In the court of civil appeals second supreme judicial district of Texas at Fort Worth. Gulf Colorado & Santa Fe Ry. Co., appellant *vs.* State of Texas, appellee. Motion for rehearing. Filed in court of civil appeals for second supreme judicial district of Texas. Mar. 21, 1903. W. C. Strong, clerk. Filed in supreme court May 8, 1903. F. T. Connerly, clerk.

100 Order Overruling Motion for Rehearing.

April 4, 1903.

G., C. & S. F. Ry. Co.
vs.
STATE OF TEXAS. } 3903/4131.

APRIL 4, 1903.

This day came on to be heard the motion by appellant for rehearing in this cause, which, having been heard and considered by the court is overruled.

Proceedings in the Supreme Court of Texas.

Petition for Writ of Error.

In the Supreme Court of Texas, at Austin.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
STATE OF TEXAS, Defendant in Error. } No. —.

Petition for Writ of Error.

J. W. Terry, Chas. K. Lee, counsel for plaintiff in error.

Comes now the Gulf, Colorado & Santa Fe Railway Company and respectfully prays the court to grant it a writ of error to the honorable court of civil appeals for the second supreme judicial district

for a review and revision of the judgment rendered in the above numbered and entitled cause, and in support of this application respectfully shows to the court:

101 I.

That as shown by the transcript and by the opinion of the honorable court of civil appeals accompanying this application, this cause is within the jurisdiction of this honorable court, same being a suit for penalty in the sum of five thousand dollars. (Tr. 6.)

II.

That motion for rehearing was duly made in said court of civil appeals on practically the same grounds as are now assigned as error, and was overruled, as will fully appear from the record in said cause submitted herewith.

III.

Plaintiff in error does not agree with conclusions of fact by the honorable court of civil appeals, and its objections to such conclusions will be pointed out under the earlier assignments in this application, as provided by chapter 52 Acts of the Twenty-seventh Legislature, page 121, or in the statement under the various assignments as provided by the rules.

IV.

Plaintiff in error here shows to the court the following grounds and assignments of error on which this writ of error is prayed:

First Assignment of Error.

The court of civil appeals erred in overruling the first assignment of error of this plaintiff in error in said court which said assignment was as follows:

The court erred in its conclusions of fact in this case in finding as follows:

"On December 26th, 1901, two days after this contract for purchase had been made, Hardin was informed that the corn with which Harroun Commission Company expected to fill his order would be sacked in Kansas City, and be shipped out of Kansas City to Texarkana but at the time of making the contract he did not know from whence the corn would come."

Because the undisputed evidence shows that on the 26th day of December, 1901, the Harroun Commission Company wrote
102 the Hardin Grain Company, confirming the sale made to the Hardin Grain Company on the 24th of December of the two cars of corn, reciting that the cars were to be held at the elevator of the Harroun Commission Company for sacking; and the undis-

puted evidence is that this letter to the Hardin Grain Company correctly stated the terms of the contract and agreement of December 24th, and shows that at the very time the Hardin Grain Company bought the corn, it knew that the corn must come from a point outside of Texas.

Statement.

Samuel Hardin testified:

"When we bought the corn from the Harroun Commission Company, on December 24th, to fill the order for Saylor & Burnett, at Goldthwaite, Texas, they were merely verbal. Two days later, however, the Harroun Commission Company confirmed the purchase in writing, copy of which is hereto attached." (Tr., 36.) Lines 16–21.

The letter referred to was offered in evidence by the defendant, and bore date of December 26th, 1901, and was as follows:

"We confirm sale to you on 24th inst. of two 66,000 pound car-of bulk No. 2 mixed corn at 75½ per bus., delivered at Texarkana, our weights and grades, shipment as quickly as we can get cars, cars to be held at our elevator for sacking." (Tr. 43.) Lines 20–24.

The depositions of Samuel Hardin were retaken by the defendant and in that deposition he was asked the following question:

"In the deposition already given by you in this case you say in answer to the eighth interrogatory: 'Our object in buying the corn at Texarkana was for the purpose of expediting the shipment and the delivery of the corn.'

"In answer to the ninth interrogatory you say: 'We desired to have these cars delivered to us at Texarkana because we thought at time of purchase we could get hold of the corn there at an earlier date and consequently make an earlier delivery at Goldthwaite, than we could by waiting to buy the corn at Kansas City for direct shipment to Goldthwaite.'

103 "Now, Mr. Hardin, is it not a fact that in their letter to you of December 26, attached to your deposition, that the Harroun Commission Company stated that they had sold you two cars of corn 'delivered at Texarkana, shipment as quickly as we can get cars. Cars to be held at our elevator for sacking?' Now, is it not a fact that the Harroun Commission Co.'s letter of December 26th, correctly stated the terms of the trade made between you and that company? If not, why did you allow the Harroun Commission Co. to modify or change the trade? Are you in the habit of making a trade with a concern and then allow them to change it to suit themselves? Now, please refer to that letter, and refreshing your memory from the same, is it not a fact that when you bought the corn from the Harroun Commission Company, that you knew it was to be sacked and loaded on the cars at Kansas City?

"Now, in answer te the first cross interrogatory in your deposition you say: 'When we bought the corn from the Harroun Commission Company on December 24th, I did not know whether the Harroun

Commission Company had the corn which they intended to deliver to us at Texarkana, and did not know where they intended to get it, or whether it was to be shipped to Texarkana from some other point, or whether they had the corn in transit to or at Texarkana. We simply bought the corn from them at the market price, to be delivered to us at Texarkana.'"

"Now, if you were interested in expediting the movement of the corn, how does it happen that you found out nothing from the Harroun Commission Company as to where the corn was or how soon it could be shipped? If it was already at Texarkana, is it not true that it should have made a more rapid trip to Goldthwaite than if it had to be shipped to Kansas City? If prompt delivery was on your mind, why did you not find out something about these things? Is it not a fact that you made no inquiries as to where the corn was, because the question of expediting the shipment was not the material fact in your mind?" (Tr., 46–47) line 6–line 18.

To which questions, the witness answered:

""My recollection is that the confirmation of the trade be-
104 tween ourselves and the Harroun Commission Company stated the terms of our purchase covering the two cars of corn in question. That letter of confirmation from the Harroun Commission Company is attached to the original deposition and is not now in our possession, and I do not recall its exact language. If we allowed the Harroun Commission Company to change or modify their original terms of purchase, we did so because it was our privilege, with their consent. We are in the habit of allowing confirmations to be changed with our consent at any time, whether written or verbal. This letter of confirmation is not in our possession, but as we recollect, at the time of this purchase verbally there was no understanding as to where the corn was to be shipped from, or as to where the cars were to be loaded; in other words, it was a matter of perfect indifference to us, so long as the corn was to be delivered to us at Texarkana at the purchase price and as quickly as possible, and at the time of purchase I did not know that the corn would be loaded and sacked at Kansas City, as the Harroun Commission Company sometimes loaded corn for us at St. Joseph, Mo.; at other times at Kansas City, and at still others, the corn was at Texarkana at the time of purchase.

"I do not now remember all the minutiæ that passed between ourselves and the Harroun Commission Company relative to the shipment of this corn, and cannot state why we did not do this or that relative to ascertaining just where the corn was to come from or where it was at the time of purchase. Expediting shipments is always a material fact in the order trade, and the Harroun Commission Company being large handlers of corn, were usually in a position to make prompt delivery of purchases of grain from them. We insist that this purchase was not made f. o. b. Texarkana, because by doing so we could obtain a cheaper rate to Goldthwaite than by making shipments direct from Kansas City to that point,

as the freight actually paid by the Harroun Commission Company to Texarkana, and by us from Texarkana to Goldthwaite, will verify, I think.

"Anybody knows that if the corn had been already at Texarkana, at the time of purchase or earlier, it was delivered to us at
105 that point the quicker, in all probabilities it would have reached Goldthwaite. I don't remember that I made any inquiries at the time of purchase as to where the corn was at that time." (Tr., 47, line 20–48, line 30)

M. S. Bird, by deposition offered in evidence by defendant, testified that he was in the employ of the Harroun Commission Company as salesman. That the letter of December 26th of the Harroun Commission Co. to the Hardin Grain Company was correct; that the Harroun Commission Company sold the Hardin Grain Co. the two cars of corn on the 24th of December, 1901, but did not confirm the sale until the 26th of December. (Tr., 55, lines 1–9)

The letter of December 26th, 1901, from the Harroun Commission Co. to the Hardin Grain Co. correctly states the facts and the terms of trade as to the two cars of corn as verbally made with the Hardin Grain Co. (Tr., 57, lines 13–16.)

NOTE.—For the convenience of the court the second, third, fourth and fifth assignments attacking the findings of the court of civil appeals will be presented together and one statement made under all of them, for the reason that to undertake to group the testimony that would be pertinent to each assignment alone would result in a repetition of the testimony and yet not aid in reaching a correct determination of the true facts. The questions presented in this application are of great importance to the railroads and to the commerce of the State and for that reason we think it desirable that the court should have a full understanding of all of the material testimony and under these assignments we will therefore make a very complete statement of the evidence.

Second, Third, Fourth, and Fifth Assignments of Error.

(2.) The court of civil appeals erred in finding that this appellant has insisted that the transportation of the corn in controversy was but a part of a more extended and continuous shipment from South Dakota to Goldthwaite, and therefore an interstate shipment, because such finding is directly contrary to appellant's contention in this case, its contention being that the testimony does not
106 warrant a finding that this was a shipment from South Dakota to Texarkana, but to the contrary that the testimony clearly shows, and there is no finding by the trial court to the contrary, that the shipment was from South Dakota to Kansas City with the right to re-ship to Texarkana if desired, but that the journey of the corn was to all practical legal intents and purposes at an end when it got to Kansas City; and that there is absolutely no testimony in this record to support a finding and claim that this was a

continuous shipment from South Dakota to Texarkana; but to the contrary that the record clearly shows that the billing from South Dakota to Texarkana was a mere matter of convenience and that it did not fix the destination of the shipment at all, *and that if it had not been for Saylor & Burnett buying the corn from Hardin, there is nothing that would suggest that the corn would ever have gone to Texarkana; it might just as well have gone to New Zealand or the North Pole, and the court's opinion is not a correct reflection of the record or the contention of the appellant.*

(3.) The court of civil appeals erred in holding that there was no finding that required the conclusion that at the time of the original shipment in South Dakota, any other place than Texarkana was intended as final destination, because there is no finding that forbids any such conclusion, and the undisputed evidence shows that naming Texarkana as the destination of a shipment was purely a matter of convenience and a makeshift, and that the real destination of the shipment when it left South Dakota was Kansas City, *and that whether it ever went beyond Kansas City or not depended upon what disposition was made of it at Kansas City,* and the statement by the court in its opinion that Texarkana was intended as its final destination is without support in the record; and the court's opinion predicated on this finding, if any, results in the failure of the court to determine the material question that both the appellant and the appellee asked the court to decide, to-wit, whether if said shipment had originated at Kansas City and had belonged to the Hardin Grain Company at the time it was sold to the Goldthwaite parties, and was billed to Texarkana and re-billed from there, would this have changed its character as interstate commerce.

107 (4.) The court of civil appeals erred in finding that the corn was cleaned and sacked at Kansas City and that it was only stopped at Kansas City for that purpose and as soon as that was done, it continued on its journey to Texarkana consigned to the order of the original shipper. Because there is no evidence in the record one way or the other as to why the grain was stopped at Kansas City and no evidence that the only purpose for so stopping it there was to clean it and to sack it, but to the contrary the evidence indicates clearly that it was usual to stop grain there *to determine its final destination.*

(5.) Because the court of civil appeals erred in finding that these transactions (to-wit, the transaction between Harroun and Hardin, and the simulated billing to Texarkana for the purpose of getting the benefit of the State rate) are not impugned by the finding of the trial court as having been done in bad faith for the purpose of and to thereby avoid the effect of the interstate commerce law; because the trial court finds that the reason why the Hardin Grain Co. contracted for the grain to be delivered to them at Texarkana was to get the advantage of a cheaper *rate.*

Statement.

The bill of lading taken out at Texarkana, which was made at the office of the Samuel Hardin Grain Company in Kansas City, and filled in with their rubber stamp, Tr., 27, is not a contract in our judgment to carry anywhere, but only a receipt for the shipment, as the point from which the shipment is to be transported and the point to which it is to be transported are not shown. But in any event the bill of lading contains an express provision limiting the liability of the T. & P. Ry. Co. to its own line. (Tr., 26.)

Samuel Hardin by deposition taken by defendant testified that he was directly interested in the suit, and willing to aid the State in any way he could. (Tr., 27 lines 26–29)

That by letter of February 7th, 1902, he reported the case to Hon. Allison Mayfield, and stated in said letter that he would be glad to give his deposition at any time he might be called upon therefor. (Tr., 27 lines 21–26)

108 That the Samuel Hardin Grain Co. did not own any ware house or keep any grain in store. That they solicited orders from Missouri, Kansas and Texas, and when they received the orders they bought the commodity and filled the orders as quickly as possible. That they had no corn on hand in ware houses on December 23rd, 1901. That on that date they wired and offered Saylor & Burnett at Goldthwaite two cars of corn at 86½c. per bushel on the track at Goldthwaite, and on that date the two cars were accepted by Saylor & Burnett and the Samuel Hardin Grain Co. so entered their order.

"The sale of this corn was predicated on my knowledge of what I could buy the grain for both in Kansas City, Mo., and Kansas City territory, and also what I could buy the corn for in Texarkana, Texas, and on my knowledge of the rates applying from Kansas City, Mo., to Goldthwaite direct, and also my knowledge of the rates obtained via Texarkana gateway, and my knowledge of the rates as prescribed by the railway commission of the State of Texas, for Texas points, particularly points on the Lampasas branch of the G. C. & S. F. Ry., including Goldthwaite, Texas. It is a fact that I am more or less familiar with the rates applying from all the territory tributary to Kansas City to Texas points, it being in my line of business to possess such information. I am familiar with the rates of the railroad commission of Texas from Texarkana to Texas points. * * *

It is a fact that I bought the two cars of corn to fill this order from the Harroun Commission Company, on the 24th day of December, 1901. We contracted to pay 75½ cents per bushel f. o. b. Texarkana, Texas, when the corn should be delivered to us at that point. At the time purchase was made we had no knowledge as to the point from which the corn would be shipped, only that it would be delivered to us at Texarkana, Texas. At the time the two cars of corn

were bought from the Harroun Commission Company they had no knowledge as to where the corn was going, but on December 31st, they advised us that they had two cars of corn which they intended to give us on the order in question and as their representative in Texarkana, Texas, had to have the bills of lading in hand for the shipment of this corn from Texarkana, Texas, to its destination, they asked us for our billing on this corn, which we furnished
109 them and they attended to having the billing executed for us from Texarkana, Texas, to Goldthwaite, Texas." * * *

The cars were loaded and shipped from Kansas City, Missouri, and were billed for Texarkana, Texas; they were not billed by us or to us.

Eighth Interrogatory.

Now, if you undertake to say that you bought these two cars from the Harroun Commission Company at a certain rate per bushel, delivered f. o. b. the cars at Texarkana, then state if it is not a fact that if you made any such arrangement or agreement with the Harroun Commission Company, that it was only in pursuance of a purpose and intention on your part, in which the Harroun Commission Company was willing to aid you, to get the benefit of the Texas State Railroad Commission rate. And is it not a fact that, if the interstate rate to Goldthwaite had been lower than the Texas Railroad Commission rate to Texarkana, that you would have had the Harroun Commission Company to ship the corn under a through way-bill to Goldthwaite?

Is it not a fact that you control and did control the billing of the cars just as you wanted it?

Is it not a fact that it was a matter of indifference with the Harroun Commission Company where they delivered you the grain—whether at Texarkana, Kansas City, point of shipment or Goldthwaite?

If you undertake to say that the facts are not correctly set forth in any of the particulars set forth in this interrogatory, then state fully and particularly what are the facts?

To which interrogatory the witness answered:

(1.) In buying corn from the Harroun Commission Company, we have no arrangement or agreement with them further than that they were to deliver the corn to us at Texarkana and receive so much per bushel for the corn when such delivery was made, and at the time of the purchase they had no knowledge of what we intended to do with the corn. *We bought the corn, delivered at Texarkana, Texas, for the purpose of filling the order we had with Saylor & Burnett, at Goldthwaite, Texas, and did employ the Texas State railway commissioner's rate from Texarkana, Texas, to Goldthwaite.* The Har-
110 roun Commission Company maintained an office at Texarkana, Texas, and had a representative there to transact their business at that point. They had grain in transit to Texarkana and at Texarkana almost continuously during the time that this purchase

was made, and our object in buying the corn at Texarkana was for the purpose of expediting the shipment and delivery of the goods, and not for the benefit of obtaining a cheaper rate to Goldthwaite than could have been obtained by shipping corn direct from Kansas City to Goldthwaite.

(2.) It is not a fact that we controlled the billing of these cars, until after the corn was delivered to us at Texarkana, Texas.

(3.) Under the terms of our purchase, the Harroun Commission Company could not deliver us the corn at any other point than at Texarkana, Texas.

Ninth Interrogatory.

Is it not a fact that you did not have any office at Texarkana, and that the Harroun Commission Company had no office at Texarkana, and that neither of you had any agent at that point, and that neither of you were engaged in business at that point, but that you conducted your business in Kansas City? If you undertake to say that either of you had an agent at Texarkana, is it not a fact that such agent represented you only for the purpose of going to the Texas and Pacific railroad, or some other railroad out of Texarkana, to get from such railroad a bill of lading on cars of grain shipped through to them? Who was such agent?

Why did you desire to have the cars delivered f. o. b. at Texarkana, Texas? Is it not a fact that you had not sold the cars at that point? Is it not a fact that the only reason for having them billed to Texarkana, Texas, was to avail the Texas Commission rate from there on? If not, why did you have them billed to Texarkana, Arkansas? or why did you not have them billed to Fort Worth, Texas? State fully your reason for not having them billed to Fort Worth, Texas, and having them billed to Texarkana, Texas? Why did you not have them billed to Pittsburg, Kansas, or some other station on the Southern Kansas or G. C. & S. F. Ry. Co., in the Indian Territory, and pay for them f. o. b. at that point: Why would it not have been just as satisfactory to you to receive
111 the grain at any of the points named as at Texarkana, Texas, except for the fact that by billing them to Texarkana, Texas, you could avail of the Texas Railroad Commission rate? Now, if you undertake to say that your having the stuff billed to you f. o. b. at Texarkana, Texas, was not for the sole and only purpose of getting the benefit of the Texas Commission rate, you will please refer to your letter books, and to a letter that you wrote under date of October 23, 1901, to L. L. Shield-, Santa Anna, Texas, you will kindly attach a true copy of that letter to your answers to these interrogatories and have the notary mark the same for ide-tification. Is it not a fact that you dictated that letter, and is it not a fact that in said letter you stated:

"We herewith forward you invoice for car of corn No. 4051 P. G., which was forwarded to you on the 18th instant, and should reach

you in due course of transportation. This corn, you understand, has to be re-billed at Texarkana, and does not go through as promptly as other shipments would, but in order to reach you at these prices it has to be billed in this way."

Now, explain what you meant by this language. If this shipment of the stuff to you at Texarkana, Texas, f. o. b., and re-billed at that place was not a mere subterfuge and scheme to evade the interstate character of the shipment and so get a lower rate, then explain fully what your letter and language to Shields meant, if it did not mean that. From whom did you buy the corn sold to L. L. Shields, referred to in said letter and when? Give dates. From what point was it shipped to Texarkana?

Who gave the direction for rebilling the Shields shipment from Texarkana? Did you not direct the parties from whom you bought the grain to have it rebilled to L. L. Shields, at Santa Anna? Give the name and present residence of the party from whom you bought the Shields grain.

Now, did you not write letters of similar purport to Saylor and Burnett? Please attach to your answers copies of all letters you wrote to Saylor & Burnett from the first of September, 1901, to the first of January, 1902? Have you done so? Are the copies attached true copies? If you do not attach copies, state why you do not?

112 Now, is it not a fact that you wrote letters of similar purport to that written Shields to grain merchants at all points along the Lampasas branch of the Santa Fe railroad, during the fall and winter of 1901, and that you were competing for business in that section on the basis of billing the stuff to Texarkana, Texas, with a view of evading the interstate rate and getting the Texas Commission rate?

If you say that any of the matters inquired about are not correctly stated in this interrogatory, state fully what are the facts with reference to such matters?

To which he answered:

"We had no office or agent at Texarkana, and we were not engaged in business at that point, and our business is conducted mainly in Kansas City. The Harroun Commission Company did maintain an office at Texarkana, a representative, F. L. Atkins, who attended to their business at Texarkana, and who attended to having the bills of lading executed by the T. & P. railway at Texarkana, Texas, to Goldthwaite, Texas, for the two shipments of corn in question. I do not know what the duties of Mr. Atkins were further than above stated.

"(2.) We desired to have these cars delivered to us at Texarkana, Texas, because we thought, at the time of purchase, we could get hold of the corn there at an earlier date, and consequently make an earlier delivery at Goldthwaite than we could by waiting to buy the corn at Kansas City for direct shipment to Goldthwaite. It is true that we had not sold any corn at Texarkana. We had the corn de-

livered to us at Texarkana, Texas, because it was the most available point at which we could have same delivered and because we believed we could make the delivery at an earlier date than by having them delivered to us at other points, *and because we could have the shipment made from Texarkana, based on the Texas railway commissioner's rate.*

"3. We wrote the letter to L. L. Shields set out in questions, and in that letter we used the language quoted. At the time that shipment was made a ten cent rate on corn obtained from Kansas City to Texarkana, Texas, which, added to the commissioner's rate
113 from Texarkana, Texas, to Santa Anna, Texas, did make a lower rate combination to that point than the through rate applying from Kansas City to Santa Anna, Texas. Santa Anna, Texas, is in what is known as group 4, Texas, and the minimum balance from Kansas City to Santa Anna is 28 cents per hundred on corn, but the same is not true on shipments destined to Goldthwaite, Texas; and we made the Shields shipment to Santa Anna via the Texarkana gateway for the purpose of getting the benefit of the cheaper rate, and this is what is meant by the letter.

"4. We bought the car of corn 4051 P. G., which was shipped to L. L. Shield-, Santa Anna, Texas, from the Merchant Elevator Company, of Kansas City, on October 17th, 1891, as per our record. The car was shipped from Kansas City, Mo., to Texarkana. We fail to find among our records, to whom the order was given to rebill the above car of corn from Texarkana, Texas, to Santa Anna, Texas, but we know that it was not the Merchant Elevator Company. We have attached copies of all our letters to Saylor & Burnett, of Goldthwaite, Texas, written between the dates of September 1st, 1901, and January 1st, 1902, which are correct copies of said letters. It is impossible for me to state to whom we wrote letters during the fall and winter of 1901, and what their purport or contents were. *It is true we were competing for business over a good portion of the State of Texas, basing our prices on shipping either direct from Kansas City, or through the Kansas City gateway, whichever we could do most, promptly or cheaply,* there was very little difference in the cost of transportation, either direct from Kansas City or St. Louis, or via Texarkana gateway. We did not bill stuff via Texarkana for the purpose of evading the interstate rate, as in most instances the interstate rate was slightly cheaper than the combination via Texarkana, but did so for expediency."

Continuing, witness testified:

"It is true we were engaged in selling grain in Texas during the fall and winter of 1901, and that there was reported to be a shortage of corn in that State, and we sold more or less grain to Texas parties. Most of the grain we sold in Texas was bought either
114 in Kansas City or St. Louis, Mo., or Cairo, Illinois, or Texarkana, Texas. We solicited orders from Texas merchants for grain to be delivered at their stations, and when orders were received we would go into the open market and buy from whoever

and whenever we could buy the cheapest, transportation to destination considered; and we would have the grain billed either direct to destination or delivered to us either at point of origin or at some intermediate point, according to which was most expedient or cheapest, price and rates considered.

"3. So far as my memory serves me, all the corn we bought was bought from people outside of the State of Texas, but we seldom knew where the corn was to come from; it was a matter of no importance to us where the corn was grown." (Tr., 28 line 1—36 line 15.)

"The method of buying and selling grain in any market, so far as I know, f. o. b. cars at a given point has always been in vogue since I had any connection or knowledge of the grain business, and it is nothing new for ourselves and many other firms to buy corn and other grain f. o. b. at any point where they could secure best prices and most favorable location for shipment to the point of ultimate destination, and has always been resorted to when any advantage could be gained by so doing. When we purchased the grain from the Harroun Commission Company f. o. b. Texarkana, we well knew what the commissioner's rate was from Texarkana, Texas, to Goldthwaite, Texas; I cannot tell you what the Harroun Commission Company knew; they had no interest in knowing anything beyond the fact that they were to deliver the corn to us at Texarkana, as their whole interest and title to the corn ceased when it was delivered to us at that point. As has been stated, perhaps twenty times in these interrogatories, our purpose for having the grain delivered to us at Texarkana, Texas, was that we might bill it to Goldthwaite, Texas, based on the rate prescribed by the railroad commission of Texas. (Tr., 38 lines 1–21.)

"As to the origin of the grain, we cannot give it to you, as corn coming into Kansas City, especially where it goes into the elevators, loses its identity and when reshipped out to a point, like Texarkana, for instance, not even the operators of the elevators themselves know where the corn originated. So far as my knowledge goes, the corn was shipped from Kansas City to Texarkana, but I do not know anything about what rate was actually charged on the corn up to that point, as we had nothing to do with that part of the shipment, it only coming into our possession and under our control after it had been delivered to us at Texarkana, Texas.

We had no office in Texarkana, nor do we transact any business there except to have shipments that may be delivered to us at that point shipped to whatever destination they may be going. (Tr., 38 line 25—38 line 6.)

From the moment I bought the corn, I knew that whatever corn was delivered to me at Texarkana would be shipped from there to Goldthwaite, Texas, to fill the order of Saylor & Burnett, and I knew as soon as informed by the Harroun Commission Company that they intended to give us two certain cars of corn to fill their contract of

December 24th, to us, that it was ultimately going to Saylor & Burnett at Goldthwaite, Texas. (Tr., 39 line 31—40, line 7.)

Witness further testified that on January 2nd, the Hardin Grain Co. rendered Saylor & Burnett an invoice covering the grain in question, showing the car in which it was shipped, but that this was not a correct invoice, as the Hardin Grain Co. had on December 31st, when they first received notice from the Harroun Commission Co. rendered Saylor & Burnett an invoice but made an error in the invoice. "I presume the grain was in transit between Kansas City and Texarkana at the time the above invoice was rendered." (Tr., 40 line 9—p. 41 line 7.)

Defendant also offered in evidence a letter from Samuel Hardin Grain Company, to Saylor & Burnett, dated December 24th, 1901, as follows:

"We received your message late yesterday as follows: 'Ship cars No. 2 sack corn 86½ delivered here,' and we hereby confirm sale to you No. 2 sacked corn f. o. b. Goldthwaite.

"We have ordered the cars for this corn and it will go forward just as soon as the railroad company can furnish the cars.

Thanking you for the order and awaiting your further favors, we remain."

Also letter from Samuel Hardin Grain Company to Saylor
116 & Bennett, dated December 31, 1901, as follows:

"We herewith hand you invoice on your two cars of corn which we sent forward from Kansas City to-day via Texarkana and will reach you in due course of transportation.

"We are mailing you our card prices to-day, and if there is anything you can use, kindly wire on receipt of same." (Tr., 43 line 24—44 line 9.)

In a second deposition taken by defendant Samuel Hardin testified:

"Relative to L. L. Shields' shipment about which I wrote Oct. 23, 1901, will state that when we wrote Mr. Shields we knew that the shipment would be made from Kansas City via Texarkana, and at that time a ten cent rate on corn from Kansas City to Texarkana prevailed, in consequence of which the Kansas City-Texarkana lines were overcrowded with business and were very slow in transporting stuff from Kansas City to Texarkana on account of the great volume of business that was moving that way. On Nov. 10th, as my memory serves me, the rate on corn from Kansas City to Texarkana was advanced from ten to fourteen cents per hundred, which, of course, lessened the number of grain shipments that were sent to Texas via Texarkana gateway, and for this reason a statement that was true in October relative to prompt movement of business via Kansas City-Texarkana lines would not be true in December, and was not true in December. While we do not see that the Shields transaction has any specific bearing on the shipment in question, we do not mind stating that the statements in our letter to Shields were true and correct at the time made." (Tr., 48-line 32—49 line 17.)

"Under our terms of purchase of this corn from the Harroun Commission Company we surrendered our control of the billing between Kansas City and Texarkana to them, and one of the reasons for doing so was because the Harroun Commission Company sold us the corn f. o. b. Texarkana at a lower price than we could have bought the corn in Kansas City and delivered it to Texarkana ourselves; and they would not have sold us the corn at Kansas City as cheaply (less freight, that we would have been compelled to pay) as they did sell it to us f. o. b. Texarkana. We of course could have bought the corn f. o. b. Kansas City and controlled the ship-
117 ment all the way through, but it would have cost us more money by doing so than to have bought it delivered Texarkana; so by paying more money we could have controlled the billing, which in our opinion would be poor business.

"I attach copy of our letter of November 15, 1901, to L. L. Shields, Santa Anna, Texas, as requested. After having read the letter over, we recollect nothing contained in said letter that is not substantially true. In this letter we state: 'The old basis of billing from here to Texas, and rebilling from there to Texas points has been abandoned, and we do not anticipate any more such long delays.' The ninth word in above quotation should read Texarkana instead of Texas. What is meant by 'The old basis being abandoned,' is that the rate of ten cents per hundred, which applied on corn from Kansas City to Texarkana prior to November 10th, had been cancelled and advanced to 14 cents per hundred. It is not a fact that the car of corn referred to in copy of letter attached to L. L. Shields was bought f. o. b. Texarkana, but was bought and paid for f. o. b. cars Kansas City."

Defendant here offered in evidence the letter to said Shields identified by the witness as follows:

"We have your letter of the 13th and note what you say relative to car No. 4551 P. & G. In reply will state as we stated in our former letter, this car went forward from Kansas City on October 18th, but was delayed in Texarkana until about November 10th or 11th when it went forward from there and it should have reached you by this time.

In making shipments to Texas all we can do of course is to get the stuff out of Kansas City promptly and then the rest all depends on the promptness with which the R. R. Co. handles the stuff. This delay we understand was caused by a blockade at Texarkana.

"The old basis of billing to Texas and rebilling to Texas points from there has been abandoned for the present and we do not anticipate any more such long delays."

The seventh interrogatory to said witness is as follows:

"If, as indicated by your deposition formerly given in this
118 case you were so anxious to expedite the shipment of grain to Messrs Saylor & Burnett at Goldthwaite, that you had it billed 50 or 100 miles out of the way via Texarkana to be handled by more railroads than would have otherwise handled it, if it had

gone direct over the Santa Fe line, why did you not provide for and stipulate that the grain should be delivered to you at Texarkana at some specified time? Why was it that you never made any agreement or provision as to when the grain should be delivered to you? Explain these matters fully."

To which the witness answered:

"In buying grain f. o. b. a given point it is not within the province of the buyer or the seller to guarantee that same will be delivered at any specific time, as the delivery at a given point always depends on the promptness with which the railroad company can transport it to such point, and therefore we could not have induced the Harroun Commission Company to guarantee any specific date of delivery at Texarkana. We have to take our chances on quick or slow delivery by the railroad company to Texarkana, the same as we would have had to take had the grain been shipped direct from Kansas City via Santa Fe system."

The eighth interrogatory to said witness was as follows:

"In your deposition heretofore given in the case you testified to a rate of 25 cents per hundred pounds from Kansas City to Goldthwaite, and you say this applied on shipments given 'transit privileges.' Now explain what you mean by shipments given transit privileges. What is the minimum rate on corn under the published tariff in December, 1900, on shipments from Kansas City to Goldthwaite; originating in Kansas City and on which no transit privileges are given, and where no reconsignment or minimum balance was involved?"

To which the witness answered:

"By 'minimum balance' of 25c. per hundred pounds on corn from Kansas City to Goldthwaite, Texas, is meant that 25c. is the lowest balance of a through rate which the railroad company will accept on corn rebilled out of Kansas City to Goldthwaite, Texas, direct,
and what are known generally as 'group 3 points of Texas,'
119 on shipments originating north of Kansas City.

We are not familiar with what all the transit privileges given on through billed stuff via Kansas City are, but the transit privileges, as we understand it, accorded to grain at Kansas City, when destined to interior Texas points, is the privilege of stopping the grain in transit at Kansas City, unloading it in an elevator, if found expedient, or desirable, and then reshipping the grain to some interior point in Texas at the balance of what would have been the through rate had the shipment been billed direct from the point of origin to some destination in interior Texas subject to a minimum rate out of Kansas City to such Texas point, established by railroad companies granting such transit privileges. The minimum balance from Kansas City to Goldthwaite, Texas, in December, 1901, was 25 cents per hundred. To illustrate how this minimum balance applies on shipments of corn from Kansas City to interior Texas points when the corn originates at different points, the railroad companies have grouped off the State of Texas in districts, designating them

'groups 1, 2, 3, 4 and 5.' They have also grouped off stations, in what is known as the supply territory, in Oklahoma, Kansas, Nebraska, Iowa, portions of Minnesota and South Dakota, into territories, designating them by the letters A, B, C, D, etc., etc. We will take a shipment of corn originating at Edgar, Nebraska, which is in supply territory designated by the letter L. The rate on corn from Edgar, Nebraska, to Goldthwaite, Texas, is 39c. per hundred pounds, when billed from point of origin to destination. The rate on corn from Edgar, Nebraska, when billed to Kansas City, is 14c. per 100 pounds; if after the corn had arrived at Kansas City it is desired to be reshipped to Goldthwaite, Texas, the railroad companies will transport it from Kansas City to Goldthwaite, Texas, at the balance of the through rate of 39c. per 100 from point of origin to destination, or 25c. per 100 pounds; this balance being the difference between the 14c. to Kansas City and the 39 cents through rate. Now we will take a shipment of corn originating at Lincoln, Neb., which is also in territory designated by letter L, on which the rate to Goldthwaite, Texas, if shipped directly through would be 39 cents per 100 pounds, the same as though originating at Edgar
120 Neb. The rate from Lincoln, Neb. to Kansas City, Mo., on corn is 10½ cents per 100 pounds. If a shipment of corn is billed to Lincoln, Neb., to Kansas City, and then it is desired to rebill said car of corn to Goldthwaite, Texas, the railroad company taking the corn south from Kansas City to Goldthwaite, would demand the balance of the 39 cents through rate or 28½ cents per 100 pounds. So it will seem that to reach interior Texas points to best advantage from Kansas City on direct shipments it is necessary to secure corn originating not only in certain territories, but that pays a certain rate to Kansas City. In Kansas City the various shipments of corn are designated as shipments which carry favorable or unfavorable billing, when it is wanted for direct shipment to interior Texas points. It frequently happens that there are days and days when shipments of corn carrying favorable billing to Texas points cannot be obtained, and frequently when cars can be obtained showing such favorable billing it is not of the grade or quality to fill the orders in hand, and in that way if we had to depend on securing corn carrying such favorable billing the shipments to Texas points would frequently be indefinitely delayed. This explains in part what we meant by saying that we bought the corn in question f. o. b. Texarkana, to expedite its ultimate delivery at Goldthwaite, Texas." (Tr., 49, line 24—54, line 32.)

M. S. Bird's Testimony.

We sold the Samuel Hardin Grain Company the said two cars of corn on the 24th day of December, 1901, but didn't confirm it until the 26th. I didn't know to whom the cars were going. I knew that they were to go beyond Texarkana, but our sale was basis of that point, Texarkana. I gave our office force directions to carry

out any billing that he might request, but do not know what directions were given. The only shipping directions so far as I am aware of were those which directed the cars to Texarkana, which were given on December 26th, the date the trade closed. Those directions were merely in the form of confirmation of the sale. The Harroun Commission Company had an agent, F. L. Atkins, at Texarkana, for the purpose of finding out when cars arrived
121 there over Kansas City Southern and other railroads, and without unloading them, getting bills of lading over the T. & P. and other railroads in points in Texas. This was the purpose for which we had Mr. Atkins stationed at Texarkana, and only stayed there when the grain was moving actively. (Tr., 55 lines 7–33.)

There was no reason why the Samuel Hardin Grain Company, as far as we were concerned, could not have shipped this to points in Louisiana, Arkansas or elsewhere and disposed of it and it would not have made any difference with us. (Tr., 58 lines 1–4.)

L. W. McBride's Testimony.

That he was agent for the Texarkana and Fort Smith Railway Company, and that his occupation in January, 1902, was the same. That P. & G. car 3845, loaded with grain, was received by the Texarkana & Fort Smith railway at Texarkana on January 7th and was delivered to F. L. Atkins, authorized agent of the Harroun Commission Company. He came to the office, surrendered the bill of lading, receipted us for the car and requested us to set it over on the T. & P. transfer track. This constituted a delivery to Atkins. The car was not unloaded while in our possession, as Mr. Atkins' place of business was not on our track. The car was transferred under the original seals. I do not know whether Mr. Atkins ever saw the car or not. It arrived January 7th and was transferred to the T. & P. on the 12th. (Tr., 61, lines 15–28.)

P. H. Goodwyn's Testimony.

I directed the making of the charge made on this shipment in person. In so doing, I acted under legal advice of Mr. Terry, the road's solicitor. I did not enforce the rate of freight provided by the railroad commission (of Texas) for a shipment from Texarkana to Goldchwaite, as per the bills of lading issued, because according to the best information I could get, the shipment did not originate at Texarkana, but it came from or through Kansas City. That it was in fact an interstate shipment was the motive or reason for the action taken. As an officer of the road, it is my duty and effort to comply with the interstate commerce law and its provisions as well as the State law. (Tr., 62 line 24—63 line 2.)

The Santa Fe was to receive on shipments of grain from
122 Kansas City coming to it from the T. & P. Railway Company and destined to Goldthwaite, 64 per cent. of the through rate; 64 per cent. for the haul from Fort Worth to Goldthwaite. The balance of the charge would go to the T. & P. and its connections. The through rate from Kansas City to Goldthwaite via Texarkana, as established by the tariff was 35 cents per 100 pounds. The Santa Fe was allowed so large a proportion as a result of the operation of a mutual agreement contemplating on the one hand the handling of business from the T. & P. from and to what we call our local territory, stations and points not reached by any other railroads; each of us respectively demanded from the other what might seem a very liberal extra large proportion of the rate *the*; the T. & P., for example, desired that the bulk of the business for this local territory should reach them over their associate lines, and failing to receive it from such lines, that they should earn on what came to them from other lines a very large division. By associated lines I mean other lines of the Gould system, lines that favored them with practically all their south-bound Texas business. We, similarly, desired that our business should reach us through our system lines which favored us with all their Texas business, and if we received a like character of business from other connections, we wanted the other connections to pay us for it. This dispor portion in the division of the through rate was because we favored the line that favored us. That is a universal policy among railroads all over the United States; everybody understands that; there is no concealment about it at all. Each line fosters its own traffic, and makes a more liberal division with those connections that give it the most business and most favor. As to whether a shipment of grain would be expedited or move more promptly coming from Kansas City through Texarkana to Goldthwaite than it would over the Atchison, Topeka and Santa Fe and the Gulf, Colorado and Santa Fe, the result naturally and almost inevitably must have been almost the contrary; in the movement of a car load of grain, for example, from Kansas City to Goldthwaite over our immediate connections, our preferred connections especially, viz: the Atchison, Topeka and Santa Fe, there is
123 no transfer of the contents en route: there is a connecting train schedule arranged from the initial point to the destination, under which schedule the cars usually move, insuring the delivery at the destination with the least possible delay. On the other hand, in movement through Texarkana there is a total absence of any such connecting schedule to begin with—the lines are not run with a view of making connections with trains on the connecting lines at all—and there is the unavoidable delay incident to the rebilling of the car at Texarkana—it may have been originally consigned there locally—upon its arrival at Texarkana, the party intending to rebill it there will have to be notified, he would surrender the original bill of lading, pay the freight on it, unless it was prepaid, give his instructions for rebilling, all of which necessarily con-

sumes a length of time, and in this particular instance, I believe, consumed six or seven days; and in the course of its further transportation from Texarkana to Goldthwaite over the T. & P. railway, there is the same liability to detention at Fort Worth—it is not exactly the same, but in the transfer of the car from the T. & P. to the Santa Fe, there is a loss of time which does not occur in the case of a through shipment. The shorter distance is also by the Atchison, Topeka and Santa Fe and the Gulf, Colorado and Santa Fe. As a matter of fact, my experience with those shipments coming through Texarkana is, that they have been almost invariably delayed. Almost every shipment that has been called to my attention has been much longer on the road than a direct shipment would have been. (Tr., 63 line 14—65 line 17.)

Cross-examined:

"It is not a fact that before instructions were given to make this charge on this shipment, that I had been advised that the railway commission had passed on this particular matter, although I had been notified that my line was only entitled to charge 12½ cents. I believe at one time I was advised by the Samuel Hardin Grain Co. that they had consulted the commission. It is my recollection that I got a telegram from them stating that fact before the collection of the charge. It is not a fact that on this and various other matters I and my road are continually violating the rules and regula-
124 tions of the railroad commission. I and my road have no set purpose to oppose the commission in its rulings. We have no such intention. Have never pursued such a practice. We have differed with the commission at times which everybody knows, but we have not any persistent aim of embarrassing or harassing the commission or of setting up our judgment in opposition to the commission, except where we think our vital rights are concerned, and those occasions do not occur often. * * * (Tr., 66 lines 1–24.)

"Whether the through rate was granted from Hudson, South Dakota, to Texarkana or not, the shippers or owners of the corn had the privilege of taking it into their possession at Kansas City, a terminal of the Chicago & St. Paul. Its bill of lading was executed by delivery at Kansas City; that is, the owners of the corn had the right to take it into their possession at Kansas City and could make a new shipment if they wanted to. This privilege is accorded to them by the railroads at any time. There is a milling and transit rate. You can ship stuff and stop it at a certain place with the privilege of shipping it afterwards to another place at the through rate."

Witness was asked: "Ain't that just exactly what was here, that *that* they had the right to ship that stuff from South Dakota to Kansas City, and stop it there and sell it if they wanted to, or take it from that point to Texarkana, and then only pay the 14 cents from Kansas City to Texarkana?" And answered: "I can only

presume that they did. I presume that they did; eighteen cents and fourteen cents appear to be the rates. There was no necessity for any such privilege on this shipment; it was simply the two rates. They could have shipped it originally from South Dakota to Kansas City for 18 cents under a bill of lading showing Kansas City to be the destination, and then could have reshipped it to Texarkana for 14 cents."

Re-direct:

The Santa Fe railway, I do not think, had any more differences with the commission than any other line operating as many
125 miles in Texas. The commission has never denied the Santa Fe the right to be heard. We understand that we have the right under the law. We have no more controversy with the commission than any other road. The feeling between my road and the members of the commission has been the reverse of ill-will. It is our policy and has been to act in harmony with the commission. It is the constant effort of myself, Mr. Terry and the law department and the general manager's office to comply with the commission's rulings until such times as we think they exceed their authority. We reserve for ourselves the right to contest if there is any vital question of revenue. In many instances the Santa Fe has surrendered to the commission what it believed to be its legal rights rather than to get into controversy. The question in this case is one of vital importance, because if we have to recognize the application of the commission rates on this corn moving through Texarkana our proportion of such rates is from 5 to 7 cents per 100 pounds; whereas, if it moves under the guise we believe it should, that of interstate commerce, the amount earned would be from 12 to 16 and 18 cents per 100 pounds. It is and was my view under the facts as I have known them and understood them, that this shipment was interstate commerce, when I ordered this rate charged.

I knew and understood that it had been sold by Kansas City parties for delivery at Goldthwaite, and that the date of the shipment from Texarkana was ten or fifteen days after the date of sale at Kansas City. It has been a very general practice in this State for grain merchants to concentrate grain and corn in Texas, and afterwards distribute it out under the interstate rate; that is the common practice, that they insist upon the interstate rate to final distination of the stuff after it has accumulated in Texas and has been held here for a while, in case it worked out to their interest. I knew at the time I made this charge that that was the general practice. It was not before I instructed the charge made in this case that Hardin had advised me the commission had told him the 12½ cent rate ought to apply, but as I recollect, it was before the car was finally delivered and the freight collected that I had such advice as that from the Hardin Grain Co. I have not looked
126 at the correspondence for a long time. Refreshing my memory from the original correspondence handed me, that

while the car was on hand at Goldthwaite (it appears) that they referred to the commission rate in their telegram to me. Apparently the last I had from them was this telegram of January 19th, reading as follows:

"Message to-day shipment corn originated Texarkana, Texas. Commissioners rate twelve and a half cents to Goldthwaite. Must insist that freight be assessed at that rate. If consignees cancel order by reason of this delay your company must assume all liability. Answer definitely quick."

To that telegram I replied, on January 19th, 1902:

"Wire yesterday. Your invoices are evidence that cars did not originate at Texarkana. Device of breaking transit there by taking out new bill of lading does not affect true character of the shipment. We must still decline to protect Texas commission rate from Texarkana."

There seems to have been nothing from the commission nor nothing quoted as coming from the commission until January 26th. No special hearing was had in this case. The matter was handled between me and *the* Commissioner Mayfield in the best of good spirit, and the road practically waived a hearing, everybody understanding practically what the facts were, and after a discussion of the matter, I and Commissioner Mayfield reached a conclusion we could not agree, and it was understood that without any formalities it would be submitted to the courts to test our legal rights. Mr. Terry and myself had a discussion with Commissioner Mayfield after the complaint had been formally filed and we could not agree as to the rights of the company in the premises. I think there was some talk at the time with Judge Bell in which this was practically agreed to be made a test case, and let the court determine whether it was interstate business under these circumstances. It is a fact that at the time of reaching the conclusion not to apply the commission rate, I was entirely familiar with the interstate commerce law, that is with the general provisions of it, respecting my business, and knew that the law placed heavy penalties upon any railroad that under any kind of cover protected a lower rate than the interstate rate. I was sort of between the devil and the deep sea.

Twenty-five cents is the lowest rate under any circumstances
127 for which corn out of Kansas can come into Goldthwaite, and that is the rate that I charged on this shipment. At that time I did not know where this corn came from to Kansas City. In making this charge I gave the shipper the benefit of the doubt and charged him the lowest possible rate from Kansas City.

Re-cross examination:

"I spoke in direct examination of the practice of shipping corn from Oklahoma Territory for example, or Kansas, here to Fort Worth, putting it into an elevator here, or into a store house, sacking, inspecting and weighing, and upon its sale to a buyer at another

point in Texas, say for instance, at Granbury (the practice applies universally whether the buyer is on our road or not), of granting the privilege of re-consigning to Texas points, corn which originates outside of Texas, with the protection of the through rate that applies from its point of origin to the point of final destination in Texas—I mean we will carry grain from Kansas City to Fort Worth,—and there it will be put in an elevator or a storehouse, as the case may be, and then it will be allowed to be loaded on the cars of our railroad company, and shipped from here, say to Temple, at a different rate from the commission rate from here to Temple. I mean to say most certainly that we are not violating law by doing that, and I am certain that the commission had never taken any jurisdiction of the practice; I know that the commission knows of it; it is abundantly shown and plainly shown in all our tariffs; it is done every day. It is a practice on our road and all others in the State. Any grain handler in Fort Worth can have the benefit of it, and a great many of them do use it. I do not recall the commission rate from here to Temple, but it is about 10c. per 100. Under this plan it would be about one or two cents—it would be the balance of the rate, whatever it might be, from the initial point in Kansas or Oklahoma, or the Indian Territory as between Fort Worth and Temple; take the rate from the initial point to Temple, say twenty-five cents, and the rate to Fort Worth, say twenty-one—then that corn would be re-hauled from Fort Worth to Temple for four cents. I know the commission knows
128 that; it has frequently been referred to in our hearing before the commission. It is simply giving the Texas dealers the same privilege enjoyed by Kansas and Oklahoma Territory dealers."

Re-direct examination:

"Transit privileges started in order to provide storage points where this grain could be taken care of until in due course of time a market could be found for it. It was simply a transit privilege to protect the consumer and facilitate its handling by the dealer. It is a practice that prevails all over the United States; it has been discussed frequently before the commission. Certainly they understand it, and those rates are allowed with the knowledge of the commission, and traffic is considered interstate traffic until it reaches the final destination of the grain. * * * In a great majority of cases there is little direct shipment from the producing point to the point of final destination. It is nearly all handled on this reconsigning basis. We will say that from a given producing point to Goldthwaite the rate is 35c. From that same producing point to Kansas City the rate is 8 cents. Upon its re-shipment after going through the Kansas City elevator, upon its re-shipment to Goldthwaite, the charge to Goldthwaite would be 27c., the through rate from the point of origin less the amount paid in to Kansas City. On the other hand, if originating in a group, where the rate was 11c. into

Kansas City, the rate from Kansas City to Goldthwaite would be 25c., or with the 11c. into Kansas City, one cent higher than the through rate. These parties could not have shipped this particular corn in this case through on that 25c. minimum balance rate, because the through rate from the point where it originated was 46c., and they paid 18c. into Kansas City, so the least it could have come out of Kansas City for was 28c. (Tr., p. 67 line 24 to p. 75 line 15.)

"Had there been any general practice of handling grain as interstate grain through Texarkana for Texas points, the railroad would have undoubtedly fixed certain minimum balances from Texarkana. But until this last season there has never been any movement of grain through Texarkana to amount to anything,
120 and it was only done this last season to get the use of the Texas commission rates applied from there. The routing taken in this case was to get the benefit of the commission rate." (Tr., 75 lines 17–25.)

Re-direct examination:

"At the time this grain was moving there was practically no grain being raised in Texas, or being moved in Texas to amount to anything; the crop was a total failure, practically; what little had been raised had been long since consumed. Not so far as any man ever heard of was there any being shipped out of Texarkana that was raised at Texarkana. There was a local wheat market at Texarkana, I presume. Ordinarily, Texarkana is not a distributing point for wheat, or corn or anything." (Tr., 76 lines 24–32.)

Defendant offered in evidence the following letter:

"Chicago. St. Louis.

McRaynolds & Company, Grain.

ST. LOUIS, Mo., March 7, 1902.

"Isbell & Co., Odessa, Texas.

"GENTLEMEN: We have your favor of the 5th, inquiring about car of corn. It has indeed taken a long time for this car to reach Texarkana. As you know the same was billed first to that point, and we expect to rebill it from there on Texas commission rates. We save considerable in freight in doing this. We are tracing for return of bill of lading to-day, and will get you papers as soon as possible; will also have the Texarkana agent wire tracer from there.

Yours truly, McREYNOLDS & COMPANY."

(Tr., 80.)

R. Fenby, by deposition for plaintiff in rebuttal, testified:

"I am auditor of the T. & P. Ry. Co. The T. & P. Ry. Co. has no authority to bind the G. C. & S. F. Ry. Co., or to act for it under

any conditions, and it is a fact that the T. & P. Ry. Co. is only authorized to collect the legally established rates, and neither
130 the T. & P. Ry. Co. nor the G. C. & S. F. Ry. Co. is bound by any quotation of a rate that is not in conformity with the legally established rate. The T. & P. Ry. Co. is not interested in any part of the property loss that may be sustained by the G. C. & S. F. Ry. Co. in handling shipments over its line, and *vice versa*, and neither road, under any conditions, undertakes to answer for the faults or negligence of the other.

"The T. & P. Ry. Co. does not recognize the G. C. & S. F. Ry. Co. as its agent for the purpose of collecting the rate or binding it by any rate, and does not recognize that it is bound by any rate other than may have been legally established. There is no more community of interest or joint undertaking between the G. C. & S. F. Ry. Co. and the T. & P. Ry. Co., where there is a joint through rate, than where there is no joint through rate.

"The T. & P. Ry. Co.'s proportion was 3.5c. per hundred pounds out of the through rate applying on shipments of corn in car loads from Kansas City via Texarkana to Goldthwaite, Texas, in December, 1901, and January, 1902. (Tr., 80–83.) Its proportion of the State Commission rate was 6¼c. per hundred pounds, (Tr., 81.) or about twice what it would have gotten out of the interstate rate."

The sixth and seventh assignments of error will be considered together.

(6.) The court of civil appeals erred in overruling the second assignment of error of this plaintiff in error in said court which said assignment was as follows:

"The court erred in his conclusions of law in this case in finding that the shipment in controversy from Texarkana to Goldthwaite, Texas, was not an interstate shipment, but originated, and terminated, in the State of Texas, and erred in that behalf in rendering a judgment against this defendant for a penalty, because the undisputed evidence and the court's conclusions of fact show that the shipment in question was an interstate shipment, and not subject to the rates and the regulations of the State commission, and therefore there should be no recovery of penalty in this case."

131 (7.) The court of civil appeals erred in overruling the third assignment of error of this plaintiff in error in said court which said assignment was as follows:

"The court erred in his conclusions of law in finding that the shipment in controversy was a State shipment, and erred in rendering judgment for penalty against this defendant, because the undisputed evidence shows that the corn in question was bought by the Hardin Grain Co. in Kansas City, Mo. from merchants there, with the then fixed purpose and intention that it should be transported and delivered to Goldthwaite, Texas, to Saylor & Burnett, without any breakage of bulk or transfer of any kind; and the undisputed evidence and the findings of the court show that when the grain was bought in Kansas City, its ultimate destination was fixed at

Goldthwaite, Texas, and when it left Kansas City, it began a journey to a destination fixed at Goldthwaite, and the shipment was therefore interstate commerce, and not subject to the rates, rules and regulations or jurisdiction of the State commission."

First Proposition under Above Assignments.

Transportation from a point in one State to a point in another is interstate commerce, without regard to the form of the bill of lading issued, or the number of bills of lading, or the form of the billing, or the rate of freight charges, or the fact that the line of some particular carrier is situated wholly within the State, and such shipment continues interstate commerce until it reaches and is delivered at final destination within the State. The true test is whether the shipment, before it enters the State? is intended to go to such final destination. If so, it continues interstate commerce, although it may be stopped in transit for the purpose of transfer from one railroad to the other, or for change of ownership.

Authorities.

State *vs.* G. C. & S. F. Ry. Co., 44 S. W. R., p. 542.
State *vs.* S. K. Ry. Co., 49 S. W. R., 252.
132 The Daniel Ball, 10 Wall., 557; 19 L. C. P., 999.
H. D. Nav. Co. *vs.* Ins. Co., 89 Tex., 1.
Ex parte Koehler, 30 Fed. Rep., 867.
Cutting *vs.* Nav. Co., 46 Fed. Rep., 641.
Augosta *vs.* Wightsville Ry. Co., 74 Fed. Rep., 523.
G. C. & S. F. Ry. Co. *vs.* Ft. Grain Co., 6 Tex. Ct. Rep. 612.

Second Proposition under Above Assignments.

It is not within the power or province of the legislature of Texas, or its commission, to prescribe rates or charges on interstate shipments, for by the Constitution of the United States the power to regulate such commerce is vested in Congress, and any attempt for its regulation by the State would be contrary to the Constitution of the United States.

Authorities.

Wabash Ry. *vs.* State of Illinois, 118 U. S., 572, and cases under first proposition.
U. S. *vs.* Knight, 156 U. S., 11, 12.
Miller *vs.* Goodman, 91 Tex., 43.

Third Proposition under Above Assignments.

The rates prescribed by the railroad commission are not intended, by the act of the Texas legislature, which created the commission, to apply to interstate shipments.

Authorities.

M. K. & T. *vs.* Fielder, 46 S. W. R. 633.
G. W. & T. P. Ry. *vs.* Barney, 45 S. W. R., 814.

Fourth Proposition under Above Assignments.

The corn in each shipment having been transported in the same cars in which they arrived in Texas to their final destination, Goldthwaite, Texas, did not become mingled or identified with
133 the commerce of the State until such final delivery was made at Goldthwaite, and until such time the same remained interstate commerce, not subject to State regulation.

Authorities.

Leisey *vs.* Hardin, 135 U. S., 100.
Miller *vs.* Goodman, 91 Texas, 41.
Lassater *vs.* Purcell Mill & E. Co., 54 S. W. R., 425.
State *vs.* Engle, 34 N. J. L., 425.
State *vs.* Corrigan, 39 N. J. L., 35.

Fifth Proposition under Above Assignments.

The identical grain had been sold by the Harroun Company to the Hardin Company before it ever left Kansas City, and was likewise sold by the Hardin Company to Saylor & Burnett, of Goldthwaite, for delivery there, before the movement of said grain from Kansas City began. So, when the shipment started, it was absolutely consigned to and bound for Goldthwaite, and the stoppage of the shipment at Texarkana was only to give same the color of a State shipment, and to avail of the State rate, and all the evidence shows this was and could have been the only purpose in so stopping the shipment at Texarkana, and the shipment clearly continued interstate, the subterfuge to the contrary notwithstanding.

Authorities.

State *vs.* S. K. Ry., 49 S. W. Rep., 252.
State *vs.* G. C. & S. F. Ry., 44 S. W. Rep., 542.

Sixth Proposition under Above Assignments.

Where, in pursuance of a contract of sale, the seller delivers the property to a carrier consigned to the seller's order, notify the purchaser, endorses the bill of lading and attaches same to a draft on the purchaser, and delivers the draft to a bank for collection, the title to the property passes to the purchaser and the seller merely has a vendor's lien to secure payment of the draft. For these
134 reasons, title to the corn was in the appellees long before the grain arrived at Texarkana.

Authorities.

Erwin *vs.* Edwards, 47 S. W. R., 719.
Maud *vs.* Coppingor, 56 S. W. R., 127.
Olcott *vs.* Nelson, 1 Gray, 536.
Dunn *vs.* State, 8 S. E. R., 806.
Sarbecker *vs.* State, 26 N. W. R., 542.
Nolan *vs.* Green, 110 Mass., 322.
Abberger *vs.* Marrin, 102 Mass., 7.
Cleveland *vs.* Williams, 29 Texas, 209.
Kean *vs.* Zundelowitz, 29 S. W. R., 930.
Freich *vs.* Mansfield, 97 Mass., 89.

Seventh Proposition under Above Assignments.

Where parties in one State order goods from persons or corporations in another State, and the goods are shipped into the State, although with a draft attached and a bill of lading, the transaction is one of interstate commerce.

Authorities.

Bateman *vs.* Western Star Milling Co., 1 Tex. Civ. App., 90.
Lyons-Thomas-Hardware Co. *vs.* Reading Hardware Co. (Tex. Civ. App., 1893); 21 S. W. R., 300.
H. Zuberbier Co. *vs.* Harris (Texas Civ. App., 1896); 35 S. W. R., 403.
C. B. Cones, etc., Mfg. Co. *vs.* Rosenbaum (Tex. Civ. App., 1898); 45 S. W., 333.
Gale Mfg. Co. *vs.* Finkelstien (Tex. Civ. App. 1899); 54 S. W. Rep., 619.

Eighth Proposition under Above Assignments.

If the destination of these shipments before they arrived in
135 Texas was really Goldthwaite the mere fact of a change in ownership would not deprive them of their character as interstate shipments. A bale of cotton in transit in the hold of a vessel between Galveston and Liverpool may change ownership by endorsement of the bill of lading, but the cotton itself will remain in the hold of the ship and will still constitute foreign commerce.

Authorities.

Mo. Pac. *vs.* Heidenheimer, 82 Tex. 195.

Eighth Assignment of Error.

The court of civil appeals erred in overruling the fourth assignment of error of the plaintiff in error in said court which said assignment was as follows:

The court erred in finding in its conclusions of law that the shipment in controversy was not an interstate shipment, and erred in rendering judgment against this defendant for penalty, because the undisputed evidence shows and the court so found, that the reason why the Hardin Grain Co. contracted for the corn to be delivered to them at Texarkana, was because they could fill their contract with Saylor & Burnett at Goldthwaite at about one and a half cents per bushel cheaper than if they had bought the grain delivered to them at Kansas City, and had shipped from Kansas City to Goldthwaite, and that the Hardin Grain Co. kept themselves informed of Interstate Commission freight rates, and of State Commission rates, and the practically undisputed evidence shows that the only purpose of billing to Texarkana and re-billing from that point was to juggle with the rates and to avoid the interstate rate and to endeavor, by makeshift and pretence, to destroy the character of the shipment and make it appear to be a State shipment when it was an interstate shipment, all of which is expressly forbidden by the provisions of the interstate commerce law, and the attempted subterfuge was of no effect and the shipment was and continued to be interstate and not State traffic, and not subject to the rules, regulations and rates of the State commission.

136 Authorities.

Act to regulate interstate commerce, section 7, and authorities cited under preceding assignments.

Ninth Assignment of Error.

The court of civil appeals erred in overruling the fifth assignment of error of this plaintiff in error in said court which said assignment was as follows:

The court erred in finding the shipment in question to be an interstate or domestic shipment, and subject to the Texas Commission rates and erred in rendering judgment for a penalty against the defendant, because the undisputed evidence shows that the shipment in controversy was a shipment from Kansas City to Goldthwaite, and the undisputed evidence shows, and the court so found, that defendant had with its connecting lines handling the shipment, established and published, and under the provisions of the interstate commerce law, filed with the Interstate Commerce Commission, rates applying on such shipment and to which under the law the shipment was subject, and was not subject to the State Commission rate.

Propositions under the Above Assignment.

(1.) The undisputed evidence in this case showing, and the court having so found, that there were through interstate rates established to apply on this shipment, to which all the carriers interested were

parties, and same having been published in conformity with the provisions of the interstate commerce law, and filed with the Interstate Commerce Commission, the shipment was not only interstate commerce, but came within the express terms of the interstate commerce law, and was traffic that not only was subject to the regulations of Congress, but that in fact had been regulated by Congress, and the State had no right to undertake its regulation.

(2.) The shipment in question being clearly and unquestionably interstate commerce, any attempt by the legislature or the railroad commission of Texas, or the courts of this State to make it subject to regulation by the State of Texas or the railroad commis-
137 sion, or the laws passed by the one or regulations established by the other, is contrary to the Constitution of the United States giving Congress the exclusive right to regulate interstate commerce, and to the acts of Congress regulating such commerce, and establishing the Interstate Commerce Commission for that purpose, and are contrary to law and will not be upheld.

Tenth Assignment of Error

The court of civil appeals erred in overruling the sixth assignment of error of this plaintiff in error in said court which said assignment was as follows:

The court erred in assessing a penalty against this defendant in this case, because the undisputed evidence shows that the defendant had not been intentionally guilty of any overcharge, but that it and its officers unintentionally, and through a mistake of fact, and on the advice of its attorneys, charged the rate that was charged, believing the shipment to be interstate and not State traffic, and not subject to the rules and regulations of the State commission.

Propositions under the Above Assignment.

(1.) Penalties are assessed for wrongful and intentional violations of law. The courts will not give penal statutes oppressive construction, or enforce penalties for action taken innocently under a mistake of fact.

(2.) The railroad company, through its officers, having acted in this instance in the best of good faith, and in the belief that their obligation under the interstate commerce law required the protection of the established rate, and under the belief that this was interstate commerce, even if the court should hold to the contrary, the railroad having acted honestly and innocently in the matter, it is not a proper case for the enforcement of the penalty.

V.

Plaintiff in error desires to submit in support of this application, a printed argument and now here prays the court to grant it ten days' time before considering this application in which to file such argument.

138 VI.

For all of which reasons and assignments as aforestated, plaintiff in error now asks for a writ of error in this case and on final hearing that the judgment of the district court and the court of appeals may be reversed and the judgment be here rendered for plaintiff in error.

Respectfully submitted,

J. W. TERRY,
CHAS. K. LEE,
Counsel for Plaintiff in Error.

(Endorsed:) App. No. 3780. In the supreme court of Texas, at Austin. Gulf Colorado & Santa Fe Railway Company, plaintiff in error, *vs.* State of Texas, defendant in error. Petition for writ of error. Filed in court of civil appeals for second supreme judicial district of Texas. May 2, 1903. W. C. Strong, clerk. Granted. Filed in supreme court May 8, 1903. F. T. Connerly, clerk. J. W. Terry, Chas. K. Lee, counsel for plaintiff in error.

Order Granting Application for Writ of Error.

May 28, 1903.

G., C. & S. F. Ry. Co. *v.* State of Texas. } App. No. 3780. From Tarrant Co., 2nd District.

This day came on to be heard the application of the G. C. & S. F. Ry. Co. for a writ of error to the court of civil appeals for the second district, and the same having been duly considered it is ordered that said application be granted and the writ of error issue as prayed for.

139 Acceptance of Service of Citation.

G., C. & S. F. Ry. Co. *vs.* State of Texas. } No. 1236. From Tarrant County, 2nd District.

Service of citation on behalf of the defendant in error, The State of Texas, is hereby accepted. Austin, Texas, May 29, 1903.

C. K. BELL,
Attorney General, Attorney for the Defendant in Error, State of Texas.

(Endorsed:) No. 1236. G., C. & S. F. Ry. Co. *vs.* State of Texas. Accepance of service of citation. May 29, 1903. Filed in supreme court May 29, 1903. F. T. Connerly, clerk.

Order of Submission.

Nov. 30, 1903.

G., C. & S. F. Ry. Co. *vs.* State of Texas. } No. 1236. From Tarrant County, Second District.

Submitted on briefs for both parties and on oral argument for plaintiff in error.

Opinion of Supreme Court.

Filed Feb. 4, 1904.

Gulf, Colorado & Santa Fe Railway Company, Plaintiff in Error, *vs.* State of Texas, Defendant in Error. } No. 1236. From Tarrant County, Second District.

This suit was brought by the State of Texas to recover of the Gulf, Colorado & Santa Fe Railway Company a penalty of $5000 for demanding and receiving for transporting a car load of corn from Texarkana, Texas, to Goldthwaite, Texas, a greater compensation than that allowed and fixed by the railroad commission of Texas for such service. The case was tried without a jury and a judgment was entered in the trial court for the sum of $100. Upon
140 appeal to the court of civil appeals the judgment was affirmed.

The trial judge filed his findings of fact, which are as follows:

"1. The railroad commission of Texas, after due notice of the time and place where the rates would be fixed by it, fixed and established the rates which might be charged by a railroad or by two or more lines of railroad, whether under the same management and control or not, for the transportation of corn, between points within the State of Texas, in car load lots at 12½ cents per one hundred pounds for a distance of over 165 miles, which rate became effective on March the 10th, 1899, and remained effective until the present time, of which action the defendant and the Texas & Pacific R. R. Company received legal notice before the rates prescribed became effective.

"2. The distance from Texarkana, Texas, to Goldthwaite, Texas, over the Texas & Pacific Railway to Fort Worth and from Fort Worth over the G. C. & S. F. railway to Goldthwaite, Texas, is more than 165 miles.

"3. The Texas & Pacific Railway Company owns and operates a railroad from Texarkana, Texas, to Fort Worth, Texas, and the de-

fendant from Fort Worth, Texas, to Goldthwaite, Texas, and each of these points and all intermediate points on each of said roads are entirely within the State of Texas.

"4. The Texas & Pacific Railway Company executed a bill of lading dated Texarkana, Texas, January 13, 1902, which bill of lading purported to acknowledge the receipt from the Samuel Hardin Grain Company at Texarkana, Texas, of one car of sacked corn, same being car 3845 P. & G. and which bill of lading purported to show that the said corn was consigned to shippers order notify Saylor & Burnett Goldthwaite, Texas.

"5. Said carload of corn was transported by the Texas & Pacific Railway Company to Fort Worth and there delivered to the defendant, and was by it received and transported to Goldthwaite, Texas, where it arrived on the 17th day of January, 1902, and Saylor & Burnett who were acting for Samuel Hardin Grain Company tendered to the defendant's agent at Goldthwaite, $82.50 in payment of the freight charges thereon; the said agent declined to accept
141 said amount of $82.50 in payment of said charges, and demanded $165.00 for the transportation of said carload of corn from Texarkana, Texas, to Goldthwaite, Texas.

"6. The agent of the defendant at Goldthwaite, Texas, charged, collected, demanded and received from Samuel Hardin Grain Company $165.00 for the transportation of said carload of 66,000 pounds of corn from Texarkana, Texas, to Goldthwaite, Texas; in so charging, collecting, demanding and receiving said $165.00 the said agent of the defendant was acting under instructions from the executive officers and attorneys of the defendant company, who believed and advised that said shipment was interstate commerce and his action in so doing was subsequently ratified by the defendant.

"7. The Samuel Hardin Grain Company made complaint to the railroad commission of Texas of the action of the defendant in charging more than 12½c. per hundred pounds for transporting said corn, whereupon the railroad commission investigated such complaint and ordered this suit to be instituted, in accordance with the provisions of article 4568 of the Revised Statutes of Texas.

"8. On December 23rd, 1901, the Samuel Hardin Grain Company at Kansas City, Mo., offered to sell Saylor & Burnett at Goldthwaite, Texas, No. 2 mixed corn at 86½ cents per bushel for delivery on ry. track at Goldthwaite and this offer was accepted for two carloads of corn. This offer and acceptance was by telegraphic communication between the parties at their respective places of business. The Hardin Grain Company did not at that time have the corn but on Dec. 24, 1901, to fill the order it contracted with the Harroun Commission Company at Kansas City for the purchase of two 66,000 pounds cars No. 2 mixed corn at 75½ cents per bushel to be delivered at Texarkana, Texas, to the Hardin Grain Company. Previously to this the Harroun Commission Company had contracted for the purchase of two cars of corn to be delivered to it at Texarkana, Texas, and with these two cars it expected to and did fill

the order of the Hardin Grain Company. These cars had originated at Hudson, S. D. The receiving carrier at Hudson was the Chicago, Milwaukee & St. Paul Railway Company who issued bills of lading limiting its liability to losses occurring on its road
142 with a like limitation of liability of all other carriers who should handle said corn in transit to its destination. By the terms of said bills of lading the corn was consigned to "Forrester Bros., Texarkana, Texas" and shipment made in cars of C. M. & St. P. Ry. Co., care of Kansas City Southern Ry. at Kansas City, Mo. with the privilege to stop the corn at Kansas City for inspection and transfer. The corn reached Kansas City on December 17th, 1901, was there unloaded, sacked and transferred to the Kansas City Southern Railway Co., who on Dec. 31st, 1901, issued bills of lading reciting that the corn was loaded in cars No. 3845, P. G. and No. 4189 P. G. that same was received of Forrester Bros. and consigned as follows, 'Shippers order notify Harroun Commission Company Texarkana, Texas,' and reciting further that freight 14 cents per hundred lbs. was prepaid, and one — these cars to wit, car 'No. 3845 P. G.' is the car in controversy in this suit.

"9. The Harroun Commission Co. paid no freight on the corn from Hudson, S. D., to Texarkana, Texas, as it had purchased it to be delivered at Texarkana.

"10. The freight on the corn from Hudson, to Texarkana, was as follows, 18 cents per 100 lbs. from Hudson to Kansas City and 14 cents from Kansas City to Texarkana all of which was paid by the vendors of Harroun Commission Company. The minimum interstate rate from Hudson South Dakota to Goldthwaite, Texas, was 46 cents per 100 lbs. which would have been apportioned as follows: 18 cents from Hudson to Kansas City and 28 cents from Kansas City to Goldthwaite, Texas. The G. C. & S. F. Ry. Co. the T. & P. Ry. Co. and the Kansas City Southern Ry. Co. together with other connecting lines from Kansas City Mo. to Goldthwaite, Texas, had established a joint tariff of 35 cents per 100 lbs. on shipment from Kansas City to Goldthwaite via Texarkana and originating in Kansas City, had agreed on a division of that rate between them and had filed tariffs establishing such rate with the Interstate Commerce Commission and by such steps had brought itself within the provisions of the interstate commerce laws.

"11. The Hardin Grain Company's officers kept themselves
143 informed of Interstate Commission freight rates and of the State Commission rates and the reason why they contracted for the corn to be delivered to them at Texarkana was because they could fill their contract with Saylor & Burnett at Goldthwaite at about 1½ cents per bushel cheaper than they could if they had bought the corn for delivery to them at Kansas City and had shipped from Kansas City to Goldthwaite.

"12. At the time of the purchase contract between the Hardin Grain Company and the Harroun Commission Company, Hardin the manager of the former company intended that the corn to be

thereby acquired should go to Saylor & Burnett and should be shipped to Goldthwaite, from Texarkana as soon as practicable, and on December 26th, 1901, two days after this contract for purchase had been made Hardin was informed that the corn with which Harroun Commission Company expected to fill his order would be sacked in Kansas City and be shipped out of Kansas City to Texarkana, but at the time of making the contract he did not know whence the corn would come.

"13. On December 31, 1901, the date of shipment from Kansas City to Texarkana, Harroun Commission Co. informed the Hardin Grain Co. that the corn to fill the latter order had been loaded to start to Texarkana and requested instructions as to how the corn should be shipped from Texarkana for the guidance of F. L. Atkins their agent at that place who would attend to such re-shipping for the Hardin Grain Company as per former understanding. Thereupon and in compliance with such request blank bills of lading were made out by the Hardin Grain Company in Kansas City and furnished to the Harroun Commission Company to be forwarded to F. L. Adkins. These bills of lading were to be executed by the Texas & Pacific Railway Company and F. L. Adkins as agent for the Hardin Grain Company and were for shipment of the corn to Goldthwaite, Texas, consigned to 'Shippers order notify &c.' giving the numbers and initials of cars which information had been furnished by the Harroun Commission Company and on January 14th, 1902, the re-shipping having been made as per instructions the bills of lading duly executed by the Texas & Pacific Ry. Co., were by Harroun delivered to Hardin Grain Co., who thereupon
144 paid the Harroun Commission Company $1779.64 the purchase price previously agreed upon for the corn and the receipt of said blank bills of lading by the Harroun Commission Company was the first information had by that company of the intended final destination and disposition of the corn.

"14. Neither Hardin Grain Co. nor Harroun Commission Co., had any store or warehouse at Texarkana but under the agreement between the two companies (Hardin and Harroun), one F. L. Adkins who was the agent of the Harroun Commission Co., and stationed at Texarkana re-shipped the corn at Texarkana for the Hardin Grain Company. That shipment was to Goldthwaite Texas, over the Texas & Pacific Ry. Co., and the G. C. & S. Ry. Co. by bill of lading reciting its receipt from Hardin Grain Co., and consigned to 'Shippers order notify Saylor & Burnet Goldthwaite, Texas,' and was transferred under original seals and without breaking packages, to the Texas & Pacific Ry. Co., after having remained at Texarkana five days, the only thing done by F. L. Adkins was to surrender the Kansas City Southern bill of lading have the cars set over on the T. & P. Ry. and take a bill of lading from the latter Co. The corn reached Texarkana January 7th, 1902, and was shipped out from Texarkana January 13th, 1902. The defendant was not a party to the bill of lading executed at Texarkana.

"15. On December 31st, 1901, Hardin Grain Co., mailed to Saylor & Burnett an invoice of the corn, in the form of an account stating the car No.'s and initial, the amount of corn and price to be paid by Saylor & Burnett."

The findings of fact were assailed in the court of civil appeals in one particular only. It was assigned as error in that court, and is also assigned in this court, that the trial judge erred in concluding that: "On December 26th, 1901, two days after this contract for purchase had been made, Hardin was informed that the corn with which Harroun Commission Company expected to fill his order would be sacked in Kansas City, and be shipped out of Kansas City to Texarkana, but at the time of making the contract he did not know whence the corn would come." It is insisted that the finding is contrary to the undisputed evidence adduced upon the
145 trial. The question so presented, if it have a material bearing upon the decision of the case, lies at its very threshhold—is the first for our determination. But we do not concur in the proposition that the finding is not supported by the evidence. The contention of counsel for the plaintiff in error seems to be based, upon the theory, that the sale by the Harroun Commission Company to the Hardin Grain Company was only completed by the letter of the former to the latter, which was written on December 26, 1901. The following is a copy of that letter: "We confirm sale to you on 24th inst. of two 66,000 pound car of bulk #2 mixed corn at 75½c. per bus., delivered at Texarkana our weights and grades shipment as quickly as we can get cars. Cars to be held at our elevator for sacking." Now there is nothing in the testimony as to the purpose of this letter. Samuel Hardin of the Hardin Grain Company testified in his first deposition, which was taken and read in evidence on behalf of the defendant corporation: "It is a fact that I bought the two cars of corn to fill this order from the Harroun Commission Company on the 24th day of December 1901." The letter indicated that this was true. The words "sale to you on the 24th inst.," tend at least to show that the sale had been made on the day mentioned. What meaning was intended to be conveyed by the word "confirm" is not so clear. It may be that an agreement had been entered into by the parties, in which the terms of the sale had been agreed upon, but which left the offer subject to the acceptance of the seller, dependent upon some contingency. Or it may be that the contract for the sale of the corn had been completed on the 24th of December and that the purpose of the letter, was merely to advise the purchasers as to the probable time of the delivery. It is probable, that the letter may be of a form in use among dealers in grain and other commodities sold in like manner; and that the language employed, according to commercial usage, had a meaning different from that which it imports in common parlance. But we find in the record no testimony as to any special meaning attached to the terms as ordinarily used by dealers in making transactions of the character of that under consideration. The letter must therefore be construed

according to the ordinary import of the words employed and
146 in the light of the circumstances attending the transaction;
and so construed we are of opinion, that it does not show beyond dispute, that the contract for the sale of the corn was not made before the letter was written. It is true, that Hardin in his testimony, speaks of the letter as confirming the sale and it may be, that the agreement was made subject to the confirmation of the Harroun Commission Company. But we think this would make no difference, since upon the confirmation the Harroun Commissson Company were bound by the contract as originally made. It follows therefore as we think, that in the determination of the case the letter is entitled to no weight, except in so far as it shows, that before the corn was delivered at Texarkana, the Hardin Grain Company were apprised that it would be shipped from the State of Missouri into the State of Texas. Since we approve the finding of the trial court and of the court of civil appeals to the effect that when the Hardin Grain Company made the contract for the purchase of the corn, they did not know from what point it would be shipped, it is unnecessary for us to pass upon the question, whether it would have altered the case, had they known the fact.

This brings us to the main question in the case. The substance of the facts as found by the trial court and the court of civil appeals seem to us to be these: The Hardin Grain Company doing business in Kansas City Missouri, having made a contract with parties at Goldthwaite, Texas, for the delivery of two carloads of corn at that place, in order to comply with their undertaking, contracted to purchase of Harroun Commission Company, who were also doing business at Kansas City, Missouri, and had an agent at Texarkana, Texas, the same quanity of corn, to be delivered at the point last named: that the corn, with which the Harroun Commission Company proposed to fulfill their contract was shipped from South Dakota to Texarkana, Texas, through Kansas City, Missouri: that while it was in transit at the latter place, the Harroun Commission Company became apprised of that fact: that the corn was delivered at Texarkana, Texas, in accordance with the agreement to the
Hardin Grain Company who thereupon shipped it in the
147 same cars, without breaking bulk, over the Texas & Pacific railway and its connecting lines to Goldthwaite, Texas.

The question then is: Was the transportation of the corn from Texarkana to Goldthwaite such a shipment within the State of Texas as to be deemed a carriage subject to the control and regulation of the railroad commission of this State? If that question be answered in the affirmative, then the judgment in this case should be affirmed: if in the negative, it should be reversed. Since the contract of the Hardin Grain Company with the initial carrier at Texarkana, was a contract for transportatioh wholly within this State, the question resolves itself into the inquiry whether the facts just stated change the character of the transportation and make the carriage from Texarkana to Goldthwaite a part of an interstate shipment.

We are of opinion, that as applied to the matter to be determined in this case, the carriage of the corn from Texarkana to Goldthwaite should be deemed independent of and wholly disconnected from its transportation to Texas from South Dakota, or Kansas City. The nearest approach to a decision of this question by this court is found in the following cases: Houston Direct Navigation Co., *vs.* The Insurance Co., (89 Tex., 1): Fuqua *v.* Brewing Co., (90 Tex., 298), and State *v.* Railway Co., (44 S. W. 592). In the case last named the opinion is by the court of civil appeals, but a writ of error was refused by this court. In the case first mentioned certain bales of cotton were delivered at Houston, Texas, to the navigation company for transportation to Galveston in the same State and the bill of lading contained this stipulation: "It is understood and expressly stipulated that the liability of the Houston Direct Navigation Company shall cease upon delivery to the next connecting line, and that the said Houston Direct Navigation Company and its connections, which receive and transport the said property, shall not be liable for loss by fire, etc." The evidence showed that the cotton was the property of foreign buyers to whom it was consigned, and that the consignors contemplated an immediate and continuous shipment to foreign ports. The cotton was destroyed by fire before it was delivered by the navigation company to the connecting line;
148 and the question was as to its liability for the loss. It was held that the shipment throughout was a foreign shipment and that the statutes of this State which prohibited common carriers, contracting for a carriage wholly within this State, from limiting their liability at common law did not apply. In the Fuqua case "the parties contracted for the sale and purchase of beer to be transported from Milwaukee to Amarillo to be there delivered to Kingsbury and become his property;" and it was held, that as soon as the beer was delivered to Kingsbury, it became a "part of the common mass of property within a State" and was "subject to its unimpeded control." In the case of the State *v.* Railway Company, *supra*, the shipment was from San Angelo, Texas, to Fort Worth in the same State; but the trial court found as a fact, that the purpose of the initial shipment was to transport the property to a point beyond the limits of the State and the court of civil appeals sustained this finding. It was held that this was an interstate shipment and that therefore it was not subject to the regulation of the railroad commission of Texas. Upon the trial there was, an attempt to show, that the purpose of the shippers was to ship the property in controversy to Fort Worth for sale at that point and that the further carriage to Kansas City was contemplated only in the event of their failure to make a sale. If the State had succeeded in establishing this fact, the case would have been brought within the rule applied in Coe *v.* Errol (116 U. S., 517): that goods in transit do not cease to be subject to the jurisdiction of a State, "until they have been shipped, or entered with a common carrier

for transportation to another State, or have been started upon such transportation in a continuous route or journey."

But such is not the case before us. Here the Harroun Commission Company, the original consignors, were the owners of the corn when shipped and until its arrival at Texarkana and delivery there to the Hardin Grain Company in compliance with their contract for its sale. They neither intended nor contemplated any shipment beyond the point to which it was consigned. When the corn was delivered to them at Texarkana, the contract on part of the carriers was performed and the carriage so far was at an end. Even
149 had they known that the buyers intended to have the corn transported to a further point in Texas, we fail to see, that it would have altered the case. Having ceased to be the owners of the corn upon its delivery to the Hardin Grain Company at Texarkana, as contemplated in their contract, they had no further control over it nor had they had any further concern with it.

As to the point of time, at which articles of commerce, which have been transported from one State into another, cease to be subject to the commerce clause of the Constitution of the United States, the Supreme Court of the United States distinctly hold, that they are exempt from regulation by the State into which they are carried, until they are delivered to the consignee, and that if they are imported for the purpose of sale, not then until they are sold, provided they are kept in the original packages. (Welton *v.* Missouri, 91 U. S., 275: Leisy *v.* Hardin, 135 U. S., 100: Ernest *v.* Missouri, 156 U. S., 296: Waring *v.* The Mayor, 8 Wall., 110: Pervear *v.* The Commonwealth, 5 Wall., 475.) In the case last cited the court say: "Merchandise in original packages, once sold by the importer, is taxable as other property." If taxable it is because it has become exempt from the operation of the commerce clause of the Constitution of the United States and fallen under the control of the State.

Nor do we think the case of the plaintiff in error presents any better aspect, when viewed from the standpoint of the Hardin Grain Company. They were not the agents of the Harroun Commission Company, nor were the latter their agents. The relation between the two was merely that of buyers and sellers. The only circumstance which tends to show, that the carriage from Texarkana to Goldthwaite was a part of an interstate transportation is the mere fact of its continuity. Immediately upon their receipt of the cars of corn the purchasers, the Hardin Grain Company, caused them to be transferred to the tracks of the Texas & Pacific Railway Company and consigned them to Goldthwaite. But as we apprehend this makes no difference. It was no concern of the purchasers, whether the corn, which was delivered to them came from Texas or from another State. Nor was it a matter of any moment to the sellers
150 what was done with it after its delivery. The instant the property was delivered and the sale completed, according to the authorities cited, it became a part of the common mass of prop

erty subject to the laws of Texas and its further transportation within the State was a matter for State regulation.

It follows, that in our opinion the judgment of the district court and that of the court of civil appeals should be affirmed, and it is accordingly so ordered.

R. R. GAINES,
Chief Justice.

(Endorsed:) No. 1236. G. C. & S. F. Ry. Co. *vs.* State of Texas. Opinion. Affirmed. Filed in supreme court, Feb. 4, 1904. F. T. Connerly, clerk. —— Gaines, ch. jus.

Judgment of Supreme Court.

Feb. 4, 1904.

G., C. & S. F. Ry. Co. *vs.* State of Texas. } No. 1236. From Tarrant County, Second District.

Opinion delivered by Chief Justice Gaines.

This cause came on to be heard on writ of error to the court of civil appeals for the second supreme judicial district and the original transcript in said cause being before the court, as well as the transcript showing the proceedings had in said court of civil appeals and these having been duly considered because it is the opinion of this court, there was no error in the judgment of the court of civil appeals and district court, it is therefore considered adjudged and ordered that said judgments be affirmed: that the defendant in error The State of Texas do have and recover of and from the plaintiff in error, The Gulf, Colorado and Santa Fe Railway Company and its sureties John Sealy and J. H. Hutchings the amount adjudged in the district court, together with all costs in this behalf expended in this court and in the court of civil appeals and this decision be certified to the district court for observance.

151 Motion for Rehearing.

Filed Feb. 18, 1904.

In the Supreme Court of Texas, at Austin.

Gulf, Colorado & Santa Fe Railway Company, Plaintiff in Error, *vs.* State of Texas, Defendant in Error.

Now comes the plaintiff in error, The Gulf Colorado & Santa Fe Railway Company, and moves the court to set aside the judgment

heretofore rendered in this cause, and grant it a rehearing herein, and for grounds of this motion respectfully shows to the court:

I.

That this court erred in finding that there was no error in the conclusion of fact of the trial court, that:

"On December 26th, 1901, two days after this contract for purchase had been made, Hardin was informed that the corn with which Harroun Commission Company expected to fill his order would be sacked in Kansas City, and be shipped out of Kansas City to Texarkana, but at the time of making the contract he did not know from whence the corn would come."

and erred in overruling plaintiff in error's first assignment complaining of said finding by the trial court, and the action of the court of civil appeals in sustaining the same.

II.

That this court erred in holding that there was no error in the finding of the court of civil appeals that this plaintiff in error has insisted that the transportation of the corn in controversy was but a part of a more extended and continuous shipment from South Dakota to Goldthwaite, and therefore an interstate shipment, because such finding is directly contrary to appellant's contention in this case; its contention being that the testimony does not warrant a finding that this was a shipment from South Dakota to Texarkana,
but to the contrary that the testimony clearly shows, and
152 there is no finding by the trial court to the contrary, that the
shipment was from South Dakota to Kansas City with the right to re-ship to Texarkana, if desired, but that the journey of the corn was to all practical, legal intents and purposes at an end when it got to Kansas City; and there is absolutely no testimony in this record to support a finding and claim that this was a continuous shipment from South Dakota to Texarkana; but to the contrary that the record clearly shows that the billing from South Dakota to Texarkana was a mere matter of convenience and that it did not fix the destination of the shipment at all, *and that if it had not been for Saylor & Burnett buying the corn from Hardin, there is nothing that would suggest that the corn would ever have gone to Texarkana; it might just as well have gone to New Zealand or the North Pole, and the court's opinion is not a correct reflection of the record or the contention of the* the *plaintiff in error.*

III.

This honorable court erred in overruling the third assignment of error complaining of the holding of the court of civil appeals that there was no finding that required the conclusion that at the time

of the original shipment in South Dakota, any other place than Texarkana was intended as final destination, because there is no finding that forbids any such conclusion, and the undisputed evidence shows that naming Texarkana as the destination of a shipment was purely a matter of convenience and a makeshift, and that the real destination of the shipment when it left South Dakota was Kansas City, and that whether it ever went beyond Kansas City or not, depended upon what disposition was made of it at Kansas City, and the statement by the court of civil appeals in its opinion that Texarkana was intended as its final destination is without support in the record; and the court's opinion predicated on this finding, if any, results in the failure of the court to determine the material question that both the appellant and the appellee asked the court to decide, to-wit: whether if said shipment had originated at Kansas City and had belonged to the Hardin Grain Company at the time it was sold to the Goldthwaite parties, and was billed to Texarkana and rebilled from there, would this have changed its char-
153 acter as interstate commerce.

IV.

This honorable court erred in overruling the plaintiff in error's fourth assignment of error, complaining of the findings of the court of civil appeals that the corn was cleaned and sacked at Kansas City and that it was only stopped at Kansas City for that purpose and as soon as that was done, it continued on its journey to Texarkana consigned to the order of the original shipper. Because there is no evidence in the record one way or the other as to why the grain was stopped at Kansas City and no evidence that the only purpose for so stopping it there was to clean it and to sack it, but to the contrary the evidence indicates clearly that it was usual to stop grain there to determine its final destination.

V.

This honorable court erred in failing to sustain the fifth assignment of the plaintiff in error, complaining of the finding of the court of civil appeals that these transactions (to-wit: the transaction between Harroun and Hardin, and the simulated billing to Texarkana for the purpose of getting the benefit of the State rate) and not impugned by the *the* finding of the trial court as having been done in bad faith for the purpose of and to thereby avoid the effect of the Interstate Commerce law; because the trial court finds that the reason why the Hardin Grain Company contracted for the grain to be delivered to them at Texarkana was to get the advantage of a cheaper rate.

VI.

This honorable court erred in overruling the second assignment of error of this plaintiff in error in the court of civil appeals, re-urged in this court, said assignment being as follows:

"The court erred in his conclusions of law in this case in finding that the shipment in controversy from Texarkana to Goldthwaite, Texas, was not an interstate shipment, but originated and terminated in the State of Texas; and erred in that behalf in rendering a judgment against this defendant for a penalty, because the undisputed evidence and the court's conclusions of fact show that
154 the shipment in question was an interstate shipment, and not subject to the rates and the regulations of the State commission, and therefore there should be no recovery of penalty in this case."

VII.

This honorable court erred in overruling the third assignment of error of the plaintiff in error, in the court of civil appeals, re-urged in this court, said assignment being as follows:

"The court erred in his conclusions of law in finding that the shipment in controversy was a State shipment, and erred in rendering judgment for penalty against this defendant, because the undisputed evidence shows that the corn in question was bought by the Hardin Grain Company in Kansas City, Missouri, from merchants there, with the then fixed purpose and intention that it should be transported and delivered to Goldthwaite, Texas, to Saylor & Burnett, without any breakage of bulk or transfer of any kind; and the undisputed evidence and the findings of the court show that when the grain was bought in Kansas City, its ultimate destination was fixed at Goldthwaite, Texas, and when it left Kansas City, it began a journey to a destination fixed at Goldthwaite, and the shipment was therefore interstate commerce, and not subject to the rates, rules and regulations or jurisdiction of the State commission."

VIII.

This honorable court erred in overruling the fourth assignment of error of the plaintiff in error in the court of civil appeals, re-urged in this court, said assignment being as follows:

"The court erred in finding in its conclusions of law that the shipment in controversy was not an interstate shipment, and erred in rendering judgment against this defendant for penalty, because the undisputed evidence shows, and the court so found, that the reason why the Hardin Grain Company contracted for the corn to be delivered to them at Texarkana, was because they could fill their contract with Saylor & Burnett at Goldthwaite at about one and a half cents per bushel cheaper than if they had bought the grain
155 delivered to them at Kansas City, and had shipped from Kansas City to Goldthwaite, and that the Harding Grain Company kept themselves informed of Interstate Commission freight rates, and of State Commission rates, and the practically undisputed evidence shows that the only purpose of billing to Texarkana and re-billing from that point was to juggle with the rates and to

avoid the interstate rate and to endeavor, by makeshift and pretence, to destroy the character of the shipment and make it appear to be a State shipment, when it was an interstate shipment, all of which is expressly forbidden by the provisions of the interstate commerce law, and the attempted subterfuge was of no effect and the shipment was and continued to be interstate and not State traffic, and not subject to the rules, regulations and rates of the State commission."

IX.

This honorable court erred in overruling the fifth assignment of error of the plaintiff in error in the court of civil appeals, re-urged in this court, said assignment being as follows:

"The court erred in finding the shipment in question to be an interstate or domestic shipment, and subject to the Texas Commission rates and erred in rendering judgment for a penalty against the defendant, because the undisputed evidence shows that the shipment in controversy was a shipment from Kansas City to Goldthwaite, and the undisputed evidence shows, and the court so found, that the defendant had with its connecting lines handling the shipment, established and published, and under the provisions of the interstate commerce law, filed with the Interstate Commerce Commission, rates applying on such shipment and to which under the law, the shipment was subject, and not subject to the State Commission rate."

X.

This honorable court erred in overruling the sixth assignment of error of the plaintiff in error in the court of civil appeals, re-urged in this court, said assignment being as follows:

"The court erred in assessing a penalty against this de-
156 fendant in this case, because the undisputed evidence shows that the defendant had not been intentionally guilty of any overcharge, but that it and its officers unintentionally and through a mistake of fact, and on the advice of its attorneys, charged the rate that was charged, believing the shipment to be interstate and not State traffic, and not subject to the rules and regulations of the State commission.

XI.

This honorable court erred in holding that under the facts in this case and under the law, the shipment in question from Texarkana, Texas to Goldthwaite, Texas was a State shipment, the practically undisputed evidence being that except for the purchase by the Goldthwaite merchants, the shipments would not have started at the time it did to Texarkana and the probabilities were that it never would have gone to Texarkana, that in truth and in fact it was in Kansas City awaiting sale, and that when it was sacked and loaded on to the cars at Kansas City, a new journey was begun with

an ultimate destination of Goldthwaite, and that the real or pretended transfer of title at Texarkana was for the sole purpose of disguising the character of the shipment, and enabling the parties at interest to get the benefit of a combination of an interstate rate to Texarkana and a State rate from Texarkana to Goldthwaite, and to deprive the carriers, and this plaintiff in error in particular, of its proper proportion of the through rate, the decision of this court therefore being in effect to deprive this plaintiff in error of its right to have its revenue from interstate commerce regulated and determined by the Constitution of the United States and the laws of Congress passed in pursuance thereof, and by the rates and tariffs established by the railroads in pursuance of the laws of Congress; and this court by its decision in this case deprives this plaintiff in error of rights, privileges and immunities claimed by it under the Constitution of the United States and the statutes thereof; and the decision of this court is against the title, rights, and privileges and immunities of this plaintiff in error set up in this case; and the decision of this court is against the authority and right by this defendant exercised to receive and collect its interstate revenue
157 from interstate traffic under the Constitution of the United States and the laws thereof; and the decision of this court is in favor of the validity of statutes and authorities and rights exercised and set up under the laws of the State of Texas which construed as by this court in its opinion are repugnant to the Constitution and law of the United States.

XII.

This honorable court erred in basing its entire opinion and judgment on the erroneous assumption that the case presented was one of a *bona fide* shipment from South Dakota to Texarkana as an ultimate and certain destination, that in transit was sold to parties who reshipped it to Goldthwaite, when the facts are, as shown by the record, that it was originally a shipment only to Kansas City, at which point the obligation of the first carrier ended, and having no other indication of being intended to go to Texarkana except a waybill notation which gave the privilege to ship to Texarkana at a regular local rate if the owner afterwards thought desirable, a contingency which might or might not have arisen, the original shipment being in effect completed at Kansas City and not at Texarkana.

13.

This honorable court erred in affirming the judgment of the trial court and of the court of civil appeals because it appears from the findings of facts made by the trial court and approved by the court of civil appeals and by this court that before the car of grain arrived at Texarkana, Texas, and while it was in another State or Territory of the United States, and after the car of grain had been sold by the Harroun Commission Company to the Hardin Grain Company, it

was the intention and purpose both of the Harroun Commission Company and of the Hardin Grain Company that the particular car of corn should be shipped to Goldthwaite, Texas, and should only stop at Texarkana, Texas for the purpose of being transferred from one railroad to another for further transportation to Goldthwaite, Texas, and it thus appearing that it was the intention of the parties who controlled the shipment before the car of corn arrived at Texarkana, Texas, and while it was in another
158 State or Territory that the same should be stopped at Texarkana, Texas, for the purpose of said transfer, such findings of the court showed that the shipment was interstate commerce until the arrival thereof at Goldthwaite, Texas, and hence that the rates which plaintiff in error could charge thereon were controlled only by the Constitution and laws of the United States and not by the laws of the State of Texas or by the rates and regulations of its railroad commission; and in this view of the case it is immaterial whether the point of origin of the shipment was Kansas City, Mo., or Hudson, South Dakota, and in thus affirming such judgment, this court deprived plaintiff in error of a right claimed and existing under the Constitution and laws of the United States and applied to the facts of this case the laws of the State of Texas and the rules, regulations and rates of its railroad commission, which as so applied were and are contrary to the Constitution and laws of the United States.

14.

This honorable court erred in affirming the judgment of the trial court and of the court of civil appeals because on the facts as found by the trial court and approved by the court of civil appeals and by this court, it appeared that before the shipment in question arrived at Texarkana, Texas, and while the same was in another State or Territory, that the parties controlling the shipment had fixed its destination as Goldthwaite, Texas, and that its stoppage at Texarkana, Texas, was for the purpose of transfer from one railroad to another for further transportation to Goldthwaite, Texas, and the same was therefore commerce among the States and the charges which plaintiff in error was entitled to make on such shipment were subject only to the Constitution and laws of the United States and not to the constitution and laws of the State of Texas, or to the rates, rules and regulations of its railroad commission, and hence the effect of the decision of this court was and is to deny to the plaintiff in error a right claimed under the Constitution and laws of the United States, and to give effect to the laws of the State of Texas, and the rates, rules and regulations of its railroad commission which as applied to the facts of this case are contrary to
159 the Constitution and laws of the United States.

Plaintiff in error represents that Honorable C. K. Bell, attorney general of the State of Texas, who resides in Austin, Travis

county, State of Texas, is the attorney of record for defendant in error, and prays that service of this motion be had upon him.

Respectfully submitted,

C. K. LEE,
J. W. TERRY,
Attorneys for Plaintiff in Error.

AUSTIN, TEXAS, Febr'y 23rd, 1904.

Service of the foregoing motion for rehearing upon me as attorney for the defendant in error, The State of Texas, is hereby waived.

C. K. BELL,
Attorney General of the State of Texas.

(Endorsed:) Mo. No. 1179. Cause No. 1236. G. C. & S. F. Ry. Co. *vs.* State of Texas. Motion for rehearing by plaintiff in error. Service accepted. Filed in supreme court of Texas February 18, 1904, F. T. Connerly, clerk, Overruled. C. K. Lee and J. W. Terry, att'ys for plaintiff in error.

Order Overruling Motion for Rehearing.

March 21, 1904.

G., C. & S. F. RY. CO. *vs.* STATE OF TEXAS. } No. 1236. (Mo. No. 1179.) From Tarrant County, 2nd District.

This day came on to be heard the motion of G. C. & S. F. Ry. Co. for rehearing and the same having been duly considered it is ordered that said motion be overruled: that the plaintiff in
160 error Gulf, Colorado & Santa Fe Railway Company and its sureties John Sealy and J. H. Hutchings pay all costs incurred on this motion.

Petition for Allowance of Writ of Error.

Filed May 21, 1904.

In the Supreme Court of the State of Texas, at Austin.

GULF, COLORADO and SANTA FE RAILWAY COMPANY, Plaintiff in Error, *vs.* STATE OF TEXAS, Defendant in Error. } No. 1236. From Tarrant County, Texas.

Petition for Allowance of Writ of Error.

To the Honorable R. R. Gaines, chief justice of the supreme court of the State of Texas:

Comes the Gulf, Colorado and Santa Fe Railway Company, by its attorneys, C. K. Lee and J. W. Terry, and complains that in the

records and proceedings, and also in the rendition of a judgment in a suit between the Gulf, Colorado and Santa Fe Railway Company, plaintiff in error, and the State of Texas, defendant in error, in the said supreme court of the State of Texas, being the highest court of law or equity in the said State in which a decision could be rendered in said suit, and in which a final judgment was rendered against the said plaintiff in error on the 4th day of February, 1904, and in which plaintiff in error's motion for a rehearing was overruled by said court on the 21st day of March, 1904, wherein was drawn in question the validity of a statute of the State of Texas, as construed by the courts of said State, on the ground that said statute as so construed, was and is repugnant to the Constitution of the United States, and the decision was in favor of its validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States, the same being the clause conferring upon Congress the power to regulate commerce among the States and it being claimed that on
161 the facts of this case the shipment of grain involved was a shipment from one State into another and therefore subject only to the regulation of the Congress of the United States until the arrival of said shipment at its final destination, at Goldthwaite, State of Texas, and with respect to which shipment, by virtue of said clause of the Constitution of the United States, plaintiff in error claimed exemption from the rates and charges fixed by the railroad commission of the State of Texas under the authority of a statute of said State, and the decision was against the title, right, privilege, and exemption severally set up or claimed under the said clause of said Constitution, all of which appears from the records and proceedings in the said suit, manifest error hath happened to the great damage of the Gulf, Colorado and Santa Fe Railway Company; wherefore the said Gulf, Colorado and Santa Fe Railway Company, by its attorneys, prays for the allowance of writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

CHAS. K. LEE,
J. W. TERRY,
Attorneys for Gulf, Colorado &
Santa Fe Railway Company.

May 21st, 1904.—Allowed by—

R. R. GAINES,
Chief Justice of the Supreme
Court of the State of Texas.

(Endorsed:) No. 1236. Gulf, Colorado and Santa Fe Railway Company, *vs.* State of Texas. Petition for allowance of writ of error. Filed in supreme court of Texas, May 21st, 1904. F. T. Connerly, clerk

162 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Texas, holding sessions at Austin, Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Texas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Gulf, Colorado and Sante Fe Railway Company, plaintiff in error, and The State of Texas, defendant in error, being numbered 1236 on the docket of the said supreme court of Texas, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifiest error hath happened, to the great damage of the said Gulf, Colorado and Sante Fe Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctlyand openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within
163 thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 24 day of May, in the year of our Lord one thousand nine hundred and four.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk of the Circuit Court of the United States in and for the Western District of Texas, for the Fifth Circuit.

May 21st, 1904.

Allowed by:

R. R. GAINES,
Chief Justice of the said Supreme Court of the State of Texas, at Austin, Texas.

163½ [Endorsed:] Original. Gulf, Colorado and Santa Fe Railway Company *vs.* State of Texas. Writ of error. Filed in supreme court of Texas at Austin, May 21st 1904. F. F. Connerly clerk.

164 United States of America to the State of Texas, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Texas, at Austin, Texas, wherein The Gulf, Colorado and Santa Fe Railway Company is plaintiff in error and you are defendant in error, said cause being numbered 1236, on the docket of the said supreme court of the State of Texas, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. R. Gaines, chief justice of the supreme court of the State of Texas, at Austin, Texas, this 21st day of May, 1904.

[Seal of the Supreme Court of the State of Texas.]

R. R. GAINES,
Chief Justice.

Attest:
F. T. CONNERLY,
Clerk Supreme Court of the State of Texas,
By J. S. MYRICK, Deputy.

The defendant in error, The State of Texas, hereby acknowledges receipt of a copy of the within citation in error, and hereby accepts service of the same and waives further notice.

STATE OF TEXAS,
By C. K. BELL,
Attorney General.

164½ [Endorsed:] Gulf, Colorado and Santa Fe Railway Company *vs.* State of Texas. Citation in error. Filed in supreme court of Texas, at Austin, May 21st, 1904. F. T. Connerly, clerk.

165 Writ of Error Bond.

Filed May 21, 1904.

Know all men by these presents: That we, the Gulf, Colorado and Santa Fe Railway Company, as principal, and George Sealy and H. O. Stein, as sureties, are held and firmly bound unto the State of

Texas in the full and just sum of one thousand dollars ($1,000.00) to be paid to the said State of Texas; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of May, 1904.

Whereas, lately, at a term of the supreme court of the State of Texas, in a suit pending in said court between The Gulf, Colorado and Santa Fe Railway Company, plaintiff in error, and The State of Texas, defendant in error, a judgment was rendered against the Gulf, Colorado and Santa Fe Railway Company and in favor of the said State of Texas, in cause numbered 1236 on the docket of the said supreme court, by which judgment the judgment of the district court of Tarrant county, State of Texas, and of the court of civil appeals for the second supreme judicial district of the State of Texas, in said cause was affirmed, and the said Gulf, Colorado and Santa Fe railway having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Texas, citing and admonishing the State of Texas to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date hereof.

Now, the condition of the above obligation is such that if the Gulf, Colorado and Santa Fe Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

166 GULF, COLORADO AND SANTA FE RAILWAY, COMPANY,
By J. W. TERRY, Its Solicitor.
GEO. SEALY. [SEAL.]
H. O. STEIN. [SEAL.]

Attest:
A. C. TORBET, [SEAL.]
Secretary Gulf, Colorado & Santa Fe Railway Company.

May 21st, 1904.
Approved by—
R. R. GAINES,
Chief Justice Supreme Court of the State of Texas

I, Geo. Sealy, do swear that I am worth, in my own right, at least the sum of one thousand dollars after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to me; that I

reside at Galveston county, State of Texas, and have property in said State liable to execution worth more than one thousand dollars.

GEO. SEALY, Surety.

Sworn to and subscribed before me this 20th day of May, A. D. 1904. As witness my hand and official seal.

[SEAL.] (Signed) F. J. WOMACK,
Notary Public, Galveston County, Texas.

I, H. O. Stein, due swear that I am worth, in my own right, at least the sum of one thousand dollars after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to me; that I reside in Galveston county, State of Texas, and have
167 property in said State liable to execution worth one thousand dollars or more.

H. O. STEIN, Surety.

Sworn to and subscribed before me this 20th day of May, A. D. 1904.

As witness my hand and official seal.

[SEAL.] (Signed) F. J. WOMAC,
Notary Public, Galveston County, Texas.

(Endorsed:) No. 1236. Gulf, Colorado & Santa Fe Railway Company *vs.* State of Texas. Writ of error bond. Filed in supreme court of Texas, May 21st, 1904. F. T. Connerly, clerk.

Assignments of Error.

Filed May 21, 1904.

In the Supreme Court of the State of Texas.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
STATE OF TEXAS, Defendant in Error. } No. 1236.

In Error from the Supreme Court of Texas to the Supreme Court of the United States.

Now comes The Gulf, Colorado and Santa Fe Railway Company, plaintiff in error, by its attorneys Chas. K. Lee and J. W. Terry, and says that in the record and proceedings, aforesaid, there is manifest error in the judgment and decision of the supreme court of the State of Texas, to-wit:

1.

The supreme court of the State of Texas erred in finding that there was no error in the conclusion of fact of the trial court, that: "On December 26th, 1901, two days after this contract for purchase had been made, Hardim was informed that the corn with which the Harroun Commission Company expected to fill his order would be sacked in Kansas City, and be shipped out of Kan-
168 sas City to Texarkana, but at the time of making the contract he did now know from whence the corn would come."

2.

The supreme court of the State of Texas erred in holding that there was no error in the finding of the court of civil appeals that this plaintiff in error has insisted that the transportation of the corn in controversy was but a part of a more extended and continuous shipment from South Dakota to Goldthwaite, and therefore an interstate shipment, because such finding is directly contrary to appellant's contention in this case; its contention being that the testimony does not warrant a finding that this was a shipment from South Dakota to Texarkana, but to the contrary that the testimony clearly shows, and there is no finding by the trial court to the contrary, that the shipment was from South Dakota to Kansas City with the right to reship to Texarkana, if desired, but that the journey of the corn was to all practical, legal intents and purposes at an end when it got to Kansas City; and there is absolutely no testimony in this record to support a finding and claim that this was a continuous shipment from South Dakota to Texarkana; but to the contrary that the record clearly shows that the billing from South Dakota to Texarkana was a mere matter of convenience and that it did not fix the destination of the shipment at all, and that if it had not been for Saylor & Burnett buying the corn from Hardin, there is nothing that would suggest that the corn would ever have gone to Texarkana; it might just as well have gone to New Zealand or the North Pole, and the court's opinion is not a correct reflection of the record or the contention of the plaintiff in error.

3.

The supreme court of the State of Texas erred in overruling the third assignment of error of plaintiff in error in that court, complaining of the holding of the court of civil appeals, that there was no finding that required the conclusion that at the time of the original shipment in South Dakota, any other place than Texarkana was intended as final destination, because there is no finding that forbids any such conclusion, and the undisputed evidence
169 shows that naming Texarkana as the destination of the shipment was purely a matter of convenience and a makeshift, and that the real destination of the shipment when it left South Da-

kota was Kansas City, and that whether it ever went beyond Kansas City or not, depended on what disposition was made of it at Kansas City, and the statement by the court of civil appeals in its opinion that Texarkana was intended as its final destination is without support in the record; and the court's opinion predicated on this finding, if any, results in the failure of the court to determine the material question that both the appellant and appellee asked the court to decide, to-wit: whether if said shipment had originated at Kansas City and had belonged to the Hardin Grain Company at the time it was sold to the Goldthwaite parties, and was billed to Texarkana and rebilled from there, would this have changed its character as interstate commerce.

4.

The supreme court of the State of Texas erred in overruling fourth assignment of error of plaintiff in error in that court, complaining of the finding of the court of civil appeals that the corn was cleaned and sacked at Kansas City and that it was only stopped at Kansas City for that purpose and as soon as that was done, it continued on its journey to Texarkana consigned to the order of the original shipper, because there is no evidence in the record one way or the other as to why the grain was stopped at Kansas City and no evidence that the only purpose for so stopping it there was to clean it and sack it, but to the contrary the evidence indicates clearly that it was usual to stop grain there to determine its final destination.

5.

The supreme court of the State of Texas erred in failing to sustain the fifth assignment of error of the plaintiff in error in that court, complaining of the finding of the court of civil appeals that these transactions (to-wit: the transaction between Harroun and Hardin and the simulated billing to Texarkana for the purpose of getting the benefit of the State rate) are not impugned by the finding of the trial court as having been done in bad faith for the pur-
170 pose of and to thereby avoid the effect of the Interstate Commerce law; because the trial court finds that the reason why the Hardin Grain Company contracted for the grain to be delivered to them at Texarkana was to get the advantage of a cheaper rate.

6.

The supreme court of the State of Texas erred in overruling the second assignment of error of plaintiff in error, in the court of civil appeals, re-urged in the supreme court of the State of Texas, said assignment being as follows:

"The court erred in his conclusions of law in this case in finding that the shipment in controversy from Texarkana, to Goldthwaite, Texas, was not an interstate shipment, but originated and terminated in the State of Texas; and erred in that behalf in rendering a

judgment against this defendant for a penalty, because the undisputed evidence and the court's conclusions of fact show that the shipment in question was an interstate shipment, and not subject to rates and the regulations of the State commission, and therefore there should be no recovery of penalty in this case."

7.

The supreme court of the State of Texas erred in overruling third assignment of error of plaintiff in error, in the court of civil appeals, re-urged in the supreme court of the State of Texas, said assignment being as follows:

"The court erred in his conclusions of law in finding that the shipment in controversy was a State shipment, and erred in rendering judgment for penalty against this defendant, because the undisputed evidence shows that the corn in question was bought by the Hardin Grain Company in Kansas City, Missouri, from merchants there, with the then fixed purpose and intention that it should be transported and delivered to Goldthwaite, Texas, to Saylor & Burnett, without any breakage of bulk or transfer of any kind; and the undisputed evidence and the findings of the court show that when the grain was bought in Kansas City, its ultimate destination was fixed at Goldthwaite, Texas, and when it left Kansas City, it began a journey to a destination fixed at Goldthwaite, and the ship-
171 ment was therefore interstate commerce, and not subject to the rates, rules and regulations or jurisdiction of the State commission."

8.

The supreme court of the State of Texas erred in overruling the fourth assignment of error of plaintiff in error, in the court of civil appeals, re-urged in the said supreme court of the State of Texas, said assignment being, as follows:

"The court erred in finding in its conclusions of law that the shipment in controversy was not an interstate shipment, and erred in rendering judgment against this defendant for penalty, because the undisputed evidence shows, and the court so found, that the reason why the Hardin Grain Company contracted for the corn to be delivered to them at Texarkana, was because they could fill their contract with Saylor & Burnett at Goldthwaite at about one and a half cents per bushel cheaper than if they had bought the grain delivered to them at Kansas City, and had shipped from Kansas City to Goldthwaite, and that the Hardin Grain Company kept themselves informed of Interstate Commission freight rates, and of State Commission rates, and the practically undisputed evidence shows that the only purpose of billing to Texarkana and re-billing from that point was to juggle with the rates and to avoid the interstate rate and to endeavor, by makeshift and pretense, to destroy the character of the shipment and make it appear to be a State shipment,

when it was an interstate shipment, all of which is expressly forbidden by the provisions of the Interstate Commerce law, and the attempted subterfuge was of no effect and the shipment was and continued to be interstate and not State traffic, and not subject to the rules, regulations and rates of the State commission."

9.

The supreme court of the State of Texas erred in overruling the fifth assignment of error of plaintiff in error, in the court of civil appeals, re-urged in said supreme court of the State of Texas, said assignment being as follows:

172 "The court erred in finding the shipment in question to be an interstate or domestic shipment, and subject to the Texas Commission rates and erred in rendering judgment for a penalty against the defendant, because the undisputed evidence shows that the shipment in controversy was a shipment from Kansas City to Goldthwaite, and the undisputed evidence shows, and the court so found, that the defendant had with its connecting lines handling the shipment, established and published, and under the provisions of the Interstate Commerce law, filed with the Interstate Commerce Commission, rates applying on such shipment and to which under the law, the shipment was subject, and not subject to the State Commission rate."

10.

The supreme court of the State of Texas erred in holding that under the facts in this case and under the law, the shipment in question from Texarkana, Texas, to Goldthwaite, Texas, was a State shipment, the practically undisputed evidence being that except for the purchase by the Goldthwaite merchants, the shipment would not have started at the time it did to Texarkana, and the probabilities were that it never would have gone to Texarkana, that in truth and in fact it was in Kansas City awaiting sale, and that when it was sacked and loaded into the cars at Kansas City, and a new journey was begun with an ultimate destination of Goldthwaite, and that the real or pretended transfer of title at Texarkana was for the sole purpose of disguising the character of the shipment, and enabling the parties at interest to get the benefit of a combination of an interstate rate to Texarkana and a State rate from Texarkana to Goldthwaite, and to deprive the carriers, and this plaintiff in error in particular, of its proper proportion of the through rate, the decision of said supreme court therefore being in effect to deprive this plaintiff in error of its right to have its revenue from interstate commerce regulated and determined by the Constitution of the United States and the laws of Congress passed in pursuance thereof, and by the rates and tariffs established by the railroads in pursuance of the laws of Congress, and said supreme court by its decision in this case deprives this plaintiff in error of rights, privileges

and immunities claimed by it under the Constitution of the United States and the statutes thereof; and the decision of said court
173 is against the title, rights and privileges and immunities of this plaintiff in error set up in this case; and the decision of said court is against the authority and right by this defendant exercised to receive and collect its interstate revenue from interstate traffic under the Constitution of the United States and the laws thereof; and the decision of said court is in favor of the validity of statutes and authorities and rights exercised and set up under the laws of the State of Texas, which, construed as by said court in its opinion, are repugnant to the Constitution and laws of the United States.

11.

The supreme court of the State of Texas erred in basing its entire opinion and judgment on the erroneous assumption that the case presented was one of a *bona fide* shipment from South Dakota to Texarkana as ultimate and certain destination, that in transit was sold to parties who reshipped it to Goldthwaite, when the facts are, as shown by the record, that it was originally a shipment only to Kansas City, at which point the obligation of the first carrier ended, and having no other indication of being intended to go to Texarkana except a way-bill notation which gave the privilege to ship to Texarkana at a reduced rate if the owner afterwards thought desirable, a contingency which might or might not have arisen, the original shipment being in effect completed at Kansas City and not at Texarkana.

12.

The supreme court of the State of Texas erred in affirming the judgment of the trial court and of the court of civil appeals because it appears from the findings of facts made by the trial court and approved by the court of civil appeals and by said supreme court that before the car of grain arrived at Texarkana, Texas, and while it was in another State or Territory of the United States, and after the car of grain had been sold by the Harroun Commission Company to the Hardin Grain Company, it was the intention and purpose both of the Harroun Commission Company and of the Hardin Grain Company that the particular car of corn should be shipped to Goldthwaite, Texas, and should
174 only stop at Texarkana, Texas, for the purpose of being transferred from one railroad to another for further transportation to Goldthwaite, Texas, and it thus appearing that it was the intention of the parties who controlled the shipment before the car of corn arrived at Texarkana, Texas, and while it was in another State or Territory that the same should be stopped at Texarkana, Texas, only for the purpose of said transfer, such findings of the court showed that the shipment was interstate commerce until the arrival thereof at Goldthwaite, Texas, and hence that the rates

which plaintiff in error could charge thereon were controlled only by the Constitution and laws of the United States, and not by the laws of the State of Texas, or by the rates and regulations of its railroad commission; and in this view of the case it is immaterial whether the point of origin of the shipment was Kansas City, Mo. or Hudson, South Dakota, and in thus affirming such judgment, said supreme court deprived plaintiff in error of a right claimed and existing under the Constitution and laws of the United States which applied to the facts of this case; and the laws of the State of Texas and the rules, regulations and rates of its railroad commission, as so applied by the said supreme court to the facts of this case, were and are contrary to the Constitution and laws of the United States.

13.

The supreme court of the State of Texas erred in affirming the judgment of the trial court and of the court of civil appeals because on the facts as found by the trial court and approved by the court of civil appeals and by this court, it appeared that before the shipment in question arrived at Texarkana, Texas, and while the same was in another State or Territory, that the parties controlling the shipment had fixed its destination as Goldthwaite, Texas, and that its stoppage at Texarkana, Texas, was for the purpose of transfer from one railroad to another for further transportation to Goldthwaite, Texas, and the same was therefore commerce among the States and the charges which plaintiff in error was entitled to make on such shipment were subject only to the Constitution and laws of the United States and not to the constitution and laws of the State of Texas, or to the rates, rules and regulations of
175 its railroad commission, and hence the effect of the decision of said supreme court was and is to deny to the plaintiff in error a right claimed under the Constitution and laws of the United States, and to give effect to the laws of the State of Texas, and the rules, regulations and rates of its railroad commission which as applied to the facts of this case are contrary to the Constitution and laws of the United States.

Respectfully submitted,

CHAS. K. LEE,
J. W. TERRY,
Attorneys for Plaintiff in Error.

(Endorsed:) No. 1236. Gulf, Colorado & Santa Fe Railway Company *vs.* State of Texas. Assignments of error. Filed in supreme court of Texas May 21, 1904. F. T. Connerly, clerk.

176 CLERK'S OFFICE, SUPREME COURT.

I, F. T. Connerly, clerk of the supreme court of Texas, hereby certify that the foregoing one hundred and seventy-five pages, except pages 162, 163 and 164, contain a true and correct copy of a tran-

script of the record of all the proceedings had in the district court of Tarrant county, Texas, in the court of civil appeals of the second supreme judicial district of Texas and in the supreme court of the State of Texas, in cause No. 1236, Gulf, Colorado & Santa Fe Railway Company, plaintiff in error *vs.* The State of Texas, defendant in error. I further certify that the pages herein numbered 162 and 163 is the original writ of error, of which a copy has been lodged and is now on file in this office, and that the page numbered 164 is the original citation in error, of which the defendant in error, The State of Texas, through her attorney general, Honorable C. K. Bell, has been furnished a copy.

In testimony whereof, I have hereunto affixed my signature, with the seal of the supreme court of Texas, at the city of Austin, this the 3rd day of June, A. D., 1904.

[Seal Supreme Court of the State of Texas.]

F. T. CONNERLY, Clerk.

Endorsed on cover: File No. 19,406. Texas supreme court. Term No. 306. Gulf, Colorado & Santa Fe Railway Company, plaintiff in error, *vs.* The State of Texas. Filed June 28th, 1904. File No. 19,406.